Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1995

The Dry Creek Rancheria,

Petitioner,

vs.

In re Bridget and Lucy R., Minors, Cindy R. and
Richard A., James and Collette R., and
the Superior Court of Los Angeles County,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeal of the State of California
Second Appellate District, Division Three

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Should the Indian Child Welfare Act, 25 U.S.C. §1901 et seq. ("ICWA"), apply only to those Indian Children that fall within the "Existing Indian Family" exception created by the California Court of Appeal or should it apply to all children who meet the definition of an "Indian Child" as defined by Congress in the ICWA?

2. Does the term "Indian Child" as defined by Congress in the Indian Child Welfare Act, classify certain children by their race in violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution or is the term a constitutionally permissible political classification enacted by Congress pursuant to its plenary power derived from the Indian Commerce Clause of the United States Constitution?

3. In the absence of the "Existing Indian Family" exception adopted by the California Court of Appeal, does the Indian Child Welfare Act infringe on the State's reserved powers to regulate domestic affairs in violation of the Tenth Amendment to the United States Constitution?

4. Does the Act require that the minor Indian children involved in this case, be returned to the custody of their natural parents, where the parents consent to relinquish their children for adoption was obtained in violation of the ICWA?

PARTIES TO THE PROCEEDING

The following are all of the parties to this proceeding: (1) Dry Creek Rancheria, a federally recognized Indian Tribe; (2) Bridget and Lucy R., minor children; (3) Cindy R. and Richard A., natural parents of the minor children; (4) James and Collette R., potential adoptive parents and (5) the Superior Court of Los Angeles County.

Title 28 of the United States Code §2403(a) may apply to these proceedings. The Solicitor General of the United States has been served with a copy of this Petition for Writ of Certiorari as required by Rule 29(4)(b) of the Rules of the Supreme Court of the United States.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

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THE DRY CREEK RANCHERIA,

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IN RE BRIDGET and LUCY R., Minors, CINDY R. and RICHARD A., JAMES and COLLETTE R., and THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

Petitioner, Dry Creek Rancheria, prays that a writ of certiorari issue to review the judgment of the California Court of Appeal for the Second Appellate District entered in this proceeding on January 18, 1996.

CITATION TO THE OPINION BELOW

The opinion of the California Court of Appeal for the Second Appellate District is reported as In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeal for the Second Appellate District of California was entered on January 18, 1996. On February 14, 1996 the Court of Appeal filed its Order Denying Petition for Rehearing and Modifying Opinion, a copy of which is attached to this petition as Appendix B. A petition for review was filed with the California Supreme Court on February 26, 1996 and was denied on May 15, 1996. A copy of the California Supreme Court's Order denying the petition for review is attached to this Petition as Appendix C.

This petition is timely filed within ninety (90) days of May 15, 1996. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Sections 1257(a) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States which vests in the Congress of the United States the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The Due Process Clause of the Fifth Amendment of the United States Constitution, which guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Tenth Amendment to the Constitution of the United States which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1, which state that no State shall ". . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indian Child Welfare Act of 1978, codified in Title 25 of the United States Code, Section 1901 et seq. A copy of the Indian Child Welfare Act is attached to this petition as Appendix D.

STATEMENT OF THE CASE

The Dry Creek Rancheria ("Tribe") is a federally recognized Indian Tribe and the beneficial owner of the Dry Creek Rancheria ("Reservation") located in Sonoma County, California (CT 2109). The Reservation comprises approximately seventy-five (75) acres of land, legal title to which is held by the United States of America in trust for the benefit of the Tribe (CT 3050-3051).

The Dry Creek Tribal Council is the governing body of the Reservation and is recognized as such by the United States government through the Secretary of the Interior (CT 3062, 3100-105).

The Tribe is organized under Articles of Association ("Constitution") which were adopted by the Tribe on April 16, 1973 (CT 3062, 3100-105) and which, as subsequently amended, were approved by the Secretary of the Interior on August 22, 1979 (RT1 217).

Prior to the adoption of the Constitution, the Tribe governed

itself in accordance with the customs and traditions of the Tribe (RT1 248). Pursuant to the Constitution and the customs and traditions of the Tribe, any person who is a descendant of a person whose name appears on the Tribe's original June 4, 1915 Tribal roll is a member of the Tribe at birth (RT1 8).

Pursuant to the Tribe's Constitution and the customs and traditions of the Tribe, Richard A (CT 2107; RT1 20), the natural father of Bridget and Lucy, and Bridget and Lucy R. are now, and always have been, members of the Tribe since their birth (RT 354-355).

Lucy and Bridget R. are twins, born on November 9, 1993 (CT1, 885), to Cindy R. and Richard A. (CT 3-4).

Richard and Cindy discovered that Cindy was pregnant in mid-1993. Richard was 21 years old, and Cindy was 20 (RT 1024). The couple were living with their two sons, Anthony, then age two, and Richard Andrew, age one, and felt that they could not afford to take care of any more children at that time (RT 617). The young couple went to see Durand Cook, an attorney specializing in adoptions, about placing the twins for adoption, in August, 1993, (RT 889).

Durand Cook undertook representation of both the R's, a non-Indian couple seeking to adopt, and Richard and Cindy. Cook received a fee of $4,200 from the R's for the adoption, and no fee from the birth parents (RT 909; 919).

Richard did not tell his parents about Cindy's pregnancy or the plan to place the twins for adoption because he felt his mother would be disappointed in him and because he felt ashamed (RT 649; 819). His family was already providing emotional support

and financial assistance to Richard and Cindy. Cook was aware that Richard had not informed his parents of Cindy's pregnancy or the adoption plan (RT 896).

In Cook's office, Richard filled out an intake questionnaire indicating that he was a Pomo Indian (CT 2080). The trial court found that Richard gave Cook information that he was a member of an Indian tribe (RT 1026) and that Cook became aware at the initial interview that there was an issue with regard to the ICWA and that he "wanted everybody to bury their heads and not face this issue." (RT 122; RT 1104-1105).

As an adoption attorney, Cook knew that if Bridget and Lucy were Indian children, he would have to notify the prospective adoptive parents and the Tribe (RT 1019-20). Richard had never heard of the ICWA before his August, 1993, meeting with Cook (RT 833).

Upon learning that Richard was Indian, Cook told Richard that if he disclosed this information to the R's, the adoption would be stopped (RT 639) and his mother would be told about it (RT 849). Cook then gave Richard a second form to fill out (RT 639). The two forms were identical, except that on the second one Richard omitted the information that he was an Indian (RT 642). Cook did not explain to Richard that he would have rights under the ICWA, such as to have the twins placed with a tribal foster family, or that Richard and Cindy would have the right to change their minds later about any pre-adoptive placement (RT 646-648). The trial court found that Cook had "sent a message, which was, Let's not get into the Indian Child Welfare Act in this case, because it's only going to complicate the matter'" and found that but for Cook's actions, the dispute over the twins would not have

occurred (RT 1106).

After the meeting with Cook, Richard did not disclose the fact he was an Indian to the R's because of what Cook had told him (RT 612; 820). Cook did not disclose the fact that the twins were Indian to Vista Del Mar Child and Family Services ("Vista Del Mar"), the licensed adoption agency which arranged the adoption for the R's.

Richard and Cindy signed relinquishments for the twins less than ten days after the birth of the twins, and not before a judge (RT 539-540) as required under 25 U.S.C. §1913(a). Within two months after signing the papers, Richard regretted his decision and wanted his daughters back. He told his mother, Karen A., what had happened and asked for her help (RT 841). Karen A. contacted the Tribe and informed them about the birth and relinquishment of the twins. On March 9, 1994, Amy Martin, the Chairperson of the Tribe, sent a letter to Vista Del Mar, stating that the twins were Indian children and that the Tribe wished to have them placed with an Indian family, pursuant to the ICWA (CT 2009). Vista Del Mar refused to accede to this request.

Richard then sent a letter to Vista Del Mar withdrawing his consent to the adoption and asking for the return of the twins on April 22, 1994, five and a half months after the twins were placed with the R's (CT 2896; RT 605-606).

The R's refused to return the twins, and instead filed a petition, in the State of Ohio on May 4, 1994, to adopt the twins without providing notice to the Tribe. They filed a petition to terminate Richard and Cindy's rights in Los Angeles Children's Court on September 13, 1994.

The Los Angeles Children's Court ("trial court") appointed a psychologist, Dixie Noble, who met with and evaluated both families and filed a report with the trial court on January 20, 1994 (CT 3206-3418). In her report, Ms. Noble concluded that returning the children to the birth family was in Bridget and Lucy's best interests. She recommended a temporary guardianship with the paternal grandparents Karen and Richard A. (Sr.) until Richard and Cindy could "get on their feet financially." (CT 3205-3418).

The twins had visits with their birth family in December, 1994, and in the home of their grandparents Karen and Richard A. (Sr.), before the trial. Visitations were halted when the California Court of Appeal, Second District, Division Three, ("Court of Appeal") granted the R's writ of supersedeas.

On September 13, 1994, the R's filed a petition to terminate the parental rights of Richard A. and Cindy R. to their twin daughters Lucy and Bridget R. based on allegations of abandonment. On October 13, 1994, the Tribe filed a Motion to Intervene pursuant to the ICWA (CT 13). Vista Del Mar filed a Motion to Consolidate Actions and a declaratory relief action to determine the applicability of the ICWA (CT 128).

On November 3, 1994, the trial court consolidated the two actions. On November 16, 1994, the Tribe filed a Motion to Declare Applicability of the ICWA and for Immediate Return of Lucy and Bridget to their parents (CT 243). The Tribe's Motion to Intervene was granted on December 8, 1994, (RT 67).

On May 17, 1995, the trial court issued a finding of fact that Bridget and Lucy are Indian children within the meaning of the ICWA, that they are members of the Tribe, and that Richard A.

had been a member of the Tribe since his birth under tribal custom (RT 354-355). After a trial, the trial court ruled the relinquishments of the minors invalid (RT 556), and subsequently made a finding of fact that there had been no abandonment (RT 1102). The trial court ordered the return of the minors to their family and appointed paternal grandparents Karen and Richard A. (Sr.) as temporary guardians for a 90-day transition period.

On June 14, 1995, Respondents herein filed a Notice of Appeal, a Petition for Writ of Supersedeas, and a Petition for Writ of Mandate with the Court of Appeal. The Court of Appeal granted the Writ of Supersedeas and, on January 18, 1996, issued its decision reversing the trial court and remanding the case for additional hearings on whether the natural parents have significant social, cultural or political ties to the Tribe, and on the issue of a guardianship for the minors. The birth parents and the Tribe filed Petitions for rehearing, which were denied on February 14, 1996.

The Tribe filed a petition for review of the Court of Appeal's decision with the California Supreme Court on February 26, 1996. The California Supreme Court denied the Tribe's petition on May 15, 1996, necessitating the filing of this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Judicially Creating An "Existing Indian Family" Exception To The Indian Child Welfare Act, Conflicts With The Express Provision Of The Act And The Decisions Of Other State Courts Of Last Resort Interpreting The Act

A. Congress Enacted The ICWA To Protect Indian Children And Promote The Security Of Indian Tribes By Establishing Minimum Federal Standards For The Placement Of Said Children In Foster Or Adoptive Homes.

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") 25 U.S.C. §§1901-1963) ". . . to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, ..." 25 U.S.C. §1902.

Application of the ICWA is triggered by a child custody proceeding involving an Indian child. As defined by the ICWA, a "child custody proceeding" refers to proceedings for foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C. §1903(1). "Indian child" is defined as "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . .." 25 U.S.C. §1903(4). Finally, "`Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . .." 25 U.S.C. §1903(8).

At the heart of the ICWA are its provisions establishing procedural and substantive standards for Indian child custody proceedings that take place in state court. 25 U.S.C. §§1901-1915. With respect to voluntary adoptive placements, the ICWA: (1) prohibits Indian parents from voluntarily consenting to a termination of parental rights, unless such consent is "executed in writing and recorded before a Judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . .." (25 U.S.C. §1913(a).); (2) allows the parent "prior to the entry of a final decree of termination or adoption" to withdraw his or her consent "for any reason." (25 U.S.C. §1913(c).); (3) provides that the Indian parent may withdraw his/her consent to an adoption, even after "the entry of a final decree of adoption", if the consent was obtained through "fraud or duress" (25 U.S.C. §1913(d).); (4) requires that absent "good cause" to the contrary that adoptive placement be made preferentially with: (A) members of the child's extended family; (B) other members of the same tribe, or (C) other Indian families (25 U.S.C. §1915(a).) and (5) mandates that no "termination of parental rights proceedings can be held "until at least ten days" after the Indian child's tribe has received notice of the pendency of the proceedings and of its right to intervene in the case. 25 U.S.C §1912(a). Violation of any of these provisions constitutes cause for invalidating the proceedings and returning custody of the Indian child to its parents (25 U.S.C. §1914).

B. The Decision Below Conflicts With The Express Provisions Of The ICWA And The Decisions Of Other State Courts Interpreting The ICWA.

By its own express terms, the ICWA is applicable to this case. It is uncontroverted that: Bridget and Lucy R are Indian Children within the meaning of the ICWA, the Tribe of which Richard A, Bridget R. and Lucy R. are members is an Indian tribe under the ICWA (RT1 217) and that this case involves a "child custody proceedings"

under the ICWA since it sought to terminate the parental rights of Richard A., 25 U.S.C. §§1903(4), (5) and (8) and 1903(1).

Furthermore, it is undisputed that the decision of the Court of Appeal violates the express provisions of the ICWA. Richard A. never validly consented to a relinquishment of the twins for adoption as required by the ICWA (i.e., consent was never given in writing in open Court before a judge who freely informed Richard A. of his rights, including his rights under the ICWA (RT 539-540)). 25 U.S.C. §1913(a). Nor was any attempt made to place the twins with an Indian family, let alone a member of the twins' extended family or members of the Tribe as is mandated by the ICWA. 25 U.S.C. §1915(a). Finally, Richard A. had an absolute right under the ICWA to withdraw his consent to the adoptive placement "for any reason at any time prior to the entry of a final decree of termination or adoption." 25 U.S.C. §1913(c). Richard A. withdrew his consent to put the twins up for pre-adoptive placement (CT 2896; RT 605-606) prior to a "final decree of termination or adoption."

Rather than return the twins to their parents as mandated by the ICWA, 25 U.S.C. §1913(c), the Court of Appeal found the ICWA inapplicable based upon the decision of the Kansas State Supreme Court in Matter of Adoption of Baby Boy L (1982) 231 Kan. 199, which refused to apply the ICWA to an Indian child who had never "lived in an Indian family." In Re Bridget R. (1996) 41 Cal.App 4th 1483, 1498. The Baby Boy L decision is the leading case in a number of state court decisions that have carved out a judicial exception to the applicability of the ICWA, known as the "existing Indian family" exception. Generally, these cases hold the ICWA inapplicable in adoption proceedings involving an illegitimate Indian child who in the eyes of the courts has never been a member of an Indian home or participated in Indian culture, and who is being given up by his or her non-Indian mother. (See, Matter of Adoption of T.R.M. (Ind., 1988) 525 N.E. 2d.298, 303; Claymore v. Serr (S.D., 1987) 703 S.W. 2d 603, 609; In Re Adoption of Crews (1992) Wash 118 Wn. 2d.561; Matter of Adoption of Baby Boy D. (Oh., 1985) 742 P.2d 1059, 1064, cert.

den. by Harjo v. Duello, 484 U.S. 1072 (1988) and Matter of Appeal in Maricopa County (1983) 136 Ariz. 528.)

However, not all courts have adopted this view. (See, e.g., Matter of Adoption of a Child of Indian Heritage (1988) 111 N.J. 155; In re Custody of S.B.R. (1986) 43 Wn. App. 622; Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d 485; In re Crystal K (1990) 226 Cal.App. 3d 655; In re Junious M. (1983) 144 Cal.App 3d. 786; and In Re Adoption of Lindsay C. (1991) 229 Cal.App. 3d 404.) These latter decisions, the majority of which were decided after this Court's decision in Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30, have held that the applicability of the ICWA is contingent only upon whether an "Indian child" is the subject of a "child custody proceeding" as those terms are defined by the ICWA. Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d. 485, 490; In re Junious M.(1983) 144 Cal.App. 3d 786, 796.

If the Court of Appeal had followed this latter line of decisions, it would have sustained the decision of the trial court which ordered the twins returned to the custody of their natural parents.

This Court must grant this petition to ensure that federal law is not violated, that the Congressional purpose of protecting and preserving Indian Tribes is not undermined and to resolve the conflict among the state courts that the "existing Indian family" exception has created regarding the applicability of the ICWA. Unless this Court grants the Tribe's petition herein and resolves this issue once and for all there will be no uniform rule of federal law that is consistently applied to all Indian children throughout the United States.

II. The Decision Below Conflicts With The Relevant Decisions Of This Court In Holding That Without The "Existing Indian Family" Exception The Definition Of "Indian Child" Contained In The Indian Child Welfare Act Constitutes An Impermissible Racial Classification.

Again, it is uncontroverted that Bridget and Lucy R. are Indian children within the meaning of the ICWA (RT 354-355). It is also undisputed that the Tribe of which the twins are members, is an "Indian Tribe" within the meaning of the ICWA (CT 2109).

Nevertheless, the Court of Appeal refused to comply with the ICWA and order the children returned to the custody of their natural parents. In so holding, the Court of Appeal concluded that:

> ". . . if the Act applies to children whose families have no significant relationship with Indian tribal culture, such application runs afoul of the Constitution . . . on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children . . ..

In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 1511-1512 (original emphasis).

This holding is contrary to the decisions of this Court which have consistently held that legislation passed by Congress to benefit Indians does not violate the equal protection standard of the Fifth and Fourteenth Amendments to the United States Constitution. United States v. Antelope, 430 U.S. 641, 645-47 (1977); Fisher v. District Court, 424 U.S. 382, 390-91 (1976); Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

In United States v. Antelope, this Court stated that federal regulation of Indian affairs is not based upon impermissible racial classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of tribes, therefore, is governance of once sovereign political communities; it is not to be viewed as legislation of a "'racial' group, consisting of Indians . . .." Id. at 390-91.

Thus, when Congress legislates with respect to Indians, the

federal government is dealing with Tribal citizens, members of quasi-sovereign governmental entities, (i.e., tribal governments) not persons of a particular race. United States v. Antelope, 430, U.S. 641, 645-46 (1977).

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Morton v. Mancari, 417 U.S. 535, 554, n. 24 (1974).

Likewise, under the ICWA, Congress is not classifying persons on the basis of race but based upon their tribal citizenship as enrolled members of a federally recognized Indian tribe or a child of a parent enrolled with a federally recognized Indian tribe and who is himself or herself eligible for enrollment. 25 U.S.C. §1903(3), (4) and (5).

Unless reversed on review by this Court, the decision below not only calls into question the constitutionality of the ICWA but all federal legislation that applies to enrolled members of federally recognized Indian Tribes.

> Literally every piece of legislation dealing with Indian tribes and reservations, . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25

> U.S.C.) [25 U.S.C.S.] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Morton v. Mancari 417 U.S. 535, 552 (1974).

The decision below is contrary to the decisions of this Court in Antelope, Fisher, and Morton. Moreover, the decision calls into question the constitutionality of literally every piece of legislation passed by Congress affecting Indians as tribal citizens. For this reason alone, this Court should grant review of this case to determine whether the ICWA, without the "existing Indian family" exception violates the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

III. By Holding That The ICWA Violates The Tenth Amendment To The United States Constitution, The Decision Of The Court Below Conflicts With The Decisions Of This Court Which Have Held That The Commerce Clause Of The United States Constitution Vests Congress With The Exclusive Authority To Legislate In The Area Of Indian Affairs.

A. The Tenth Amendment Standard.

The Tenth Amendment to the United States Constitution makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In New York v. United States, 505 U.S. 144, (1992), this Court noted that historically it has viewed Tenth Amendment cases in either of two ways. Some cases have examined whether the act of Congress in question was "authorized by one of the powers delegated to Congress in Article I of the Constitution," Id. at 155, while other cases have

sought to determine whether a congressional act "invades the province of state sovereignty reserved by the Tenth Amendment." Id. at 155.

In New York v. United States this Court recognized that:

> the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of the State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

Id. at 156 (emphasis added). Thus "the Tenth Amendment `states but a truism that all is retained which has not been surrendered.'" Id. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941).). This Court has consistently recognized that the States retain a significant measure of sovereign authority, but only "to the extent that the Constitution has not divested them of their original powers and transferred those power to the Federal Government.'" Id. at 156 (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1985).)

In order to achieve its objectives "Congress may not simply `commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" New York v. United States at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).). However, "where Congress has the authority to regulate private activity under the Commerce Clause," this Court has:

> recognized Congress' power to offer States the choice of regulating that activity according to federal standards or

> having State law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes. These include the Clean Water Act; the Occupational Safety and Health Act of 1970; the Resource Conservation and Recovery Act of 1976; and the Alaska National Interest Lands Conservation Act.

Id. (quoting Hodel, 452 U.S. 289) (citations omitted).)

These are the precepts that this Court has established in determining whether an act of Congress violates the Tenth Amendment.

B. The States Have Delegated All Of Their Authority Over Indian Affairs To The Federal Government, And Thus Retain No Power In This Area Under The Tenth Amendment.

Section eight of Article I of the United States Constitution enumerates the powers granted to Congress. Clause three of section eight provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, §8, Cl. 3.

This Court has held that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985). Thus congressional power to legislate concerning Indian affairs is plenary. (See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); White Mountain Apache Tribe

v. Bracker, 448 U.S. 136, 142 (1980); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 361 (7th Cir. 1983); Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279, 282 (C.D. Cal. 1969), aff'd 442 F.2d 1184 (9th Cir. 1971).

It is no accident that the States have, in the Constitution, delegated all of their authority over Indian affairs to the federal government. Both the national government and the States experienced difficulties in their dealings with Indian tribes under the Articles of Confederation. This Court has noted that "[James] Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1 § 8, Cl. 3, that granted Congress the power to regulate trade with the Indians. The Federalist No. 42, p. 284 (J. Chic, ed. 1961)." Oneida County, N.Y., 470 U.S. at 234 n. 4, (1985). Long ago this Court explained that:

> Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate Commerce with the Indian Tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876).

In his classic treatise, Handbook of Federal Indian Law, Felix Cohen, then-Chairman of the Board of Appeals, Department of the Interior, noted that "[t]he Congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between States." F. Cohen, Handbook of Federal Indian Law, p. 91 (1942).[1]

As Chief Justice John Marshall noted in his opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the powers given to Congress to make war and peace, to make treaties, and to regulate Commerce with the Indian Tribes "comprehend all that is required for the regulation of our intercourse with the Indians." Id. at 559.

This Court in Worcester declared as unconstitutional Georgia laws which infringed on the tribal sovereignty of the Cherokee Nation. Id. at 561. As Chief Justice Marshall stated, those laws "interfere[d] with, and attempt[ed] to regulate and control the intercourse with the said Cherokee Nation, which, by the said constitution, belongs exclusively to the [C]ongress of the United States." Id. 540 (emphasis added). The Chief Justice also found support for his decision from the Supremacy Clause, Article IV Clause 3 of the Constitution. Marshall

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[1]The Indian Commerce Clause has supported legislation concerning transactions by which Indians sought to dispose of land or other property in exchange for money or goods. See United States v. Nice, 241 U.S. 591 (1916), Perrin v. United States, 232 U.S. 478 (1914). In addition, it has provided authority to regulate areas such as travel, crimes by whites against Indians or Indians against whites, survey of land, trespass and settlement by whites in Indian country, fixing boundaries, and the furnishings of goods, services and currency by the Federal Government. See Cohen, supra, at 92.

argued that the recognition in the Constitution of treaties previously made with the Indian tribes as the "supreme law of the land" was an explicit recognition of the sovereign status of the tribes. Id. at 559.

Read in the narrowest possible sense, Worcester stands for the proposition that the states, by ratifying the Constitution, granted to Congress the exclusive authority to legislate in the area of Indian affairs. Id. This Court has always recognized the power of Congress to restrict and direct the activities of State governments with respect to Indian affairs. In Dick v. United States, 208 U.S. 340, 353, (1908), this Court upheld a congressional restriction on State liquor sales to Indians outside of reservation boundaries. In so doing, this Court found that Congressional authority "is superior and paramount to the authority of any State within whose limits are Indian tribes . . .. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes." Id.

In addition to liquor sales, State authority over reservation activities has been found by this Court to be preempted by federal law in a wide variety of contexts over the years. These include State taxation of Indians, Bryan v. Itasca County, 426 U.S. 373, (1976) and non-Indians, Ramah Navajo School Board v. Department of Revenue, 458 U.S. 832, (1982). In addition, States have no independent or inherent authority to prosecute Indians for crimes committed on the reservation, Superintendent v. Seymour, 368 U.S. 351, (1962), or to regulate on-reservation hunting and fishing, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, (1983).

Finally, this Court has held that the States have no jurisdiction over Indians or non-Indians engaging in on-reservation gaming activities. California v. Cabazon, 480 U.S. 202 (1987).

Despite this overwhelming authority to the contrary, the Court of Appeal, relying on this Court's decision in United States v. Lopez, _ U.S. __, 115 S.Ct. 1624 (1995), held that the ICWA, without the "existing Indian family" exception, impermissibly intrudes upon the

State's power to regulate domestic or family relations in direct violation of the Tenth Amendment to the United States Constitution. In Re Bridget R. (1996) 41 Cal.App 4th 14 at, 1512.

The Court of Appeal's reliance on United States v. Lopez to support its holding is misplaced for two reasons. First, Lopez dealt with the authority of Congress under the Interstate Commerce Clause as opposed to the Indian Commerce Clause of the United States Constitution. As this Court stated in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989):

> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, [citations omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs [citation omitted]. . .

Id. at 192.

Second, in Lopez, this Court addressed the issue of Congress's authority, under the Interstate Commerce Clause, to legislate in areas, otherwise reserved to the States (i.e., possession of firearms at a school.) (United States v. Lopez, __U.S. __, at __, 115 S.Ct. at 1630.) As shown above, the States have no authority to regulate Indian affairs having granted Congress the sole and exclusive authority to legislate in this area by ratifying the United States Constitution. U.S. CONST. Art. I, §8, cl.3. As stated above, where "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any

reservation of that power to the States" New York v. United States, 505 U.S. at 156. Thus, the States retain no power whatsoever over Indian affairs within the meaning of the Tenth Amendment. Because this power "is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . ." Id.

To erase any doubts that Congress has exclusive authority under the Indian Commerce Clause to legislate in the area of Indian affairs and to ensure that over one hundred years of precedents of this Court holding that Congress' power over Indian affairs is plenary are not violated, this Court must grant this writ.

IV. The Court Below, In Adopting The "Existing Indian Family" Exception To The Indian Child Welfare Act, Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

A. The Decision Below Is Preempted By The ICWA And Violates The Supremacy Clause Of The United States Constitution.

In its decision, the Court of Appeal has created additional criteria for defining who is or is not an Indian for the purpose of determining whether a child will be afforded the protection of the ICWA.

In the ICWA, Congress has said that an Indian Child is a minor who is an enrolled member of a federally recognized Indian tribe, a tribal citizen, or the minor child of a parent who is an enrolled member of a federally recognized Indian tribe. 25 U.S.C. §1903(3), (4), and (5). Despite the plain wording of the ICWA, the Court of Appeal has held that this is not enough. According to the Court of Appeal, to be an Indian child under the ICWA, you must not only be an enrolled member of a federally recognized Indian tribe but also a child that

maintains "significant social, cultural, or political relationships with Indian community life . . .." In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 1511.

This "existing Indian family" exception adopted by the Court of Appeal places additional burdens on the comprehensive ICWA statutory scheme, something which Congress never contemplated. Such additional burdens stand as an obstacle to the purposes and policies of the ICWA, that is, to prevent Indian children who are tribal citizens from being removed from their Indian parents, who are also tribal citizens. Since the present case is governed by the express provisions of the ICWA, federal law preempts the authority of the states to legislate on the subject or, as in this case, judicially create additional criteria defining who is an Indian child.

> . . . by enacting these statutes, Congress "has undertaken to regulate Reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." . . .

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980); See also, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151-353 (1980), Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691, n. 18 (1965).

The decision below not only runs afoul of the express provisions of the ICWA but also Congress' exclusive authority under the Indian Commerce Clause (U.S. CONST. art. I, §8, cl.3.) to legislate in the area of Indian Affairs in direct violation of the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl.3.

An important policy consideration in this Court's Supremacy Clause cases is whether or not there is an apparent need for national uniformity in a federal scheme, (Florida Lime & Avocado Grower v. Paul, 373 U.S. 132, 144 (1963) or whether the state laws in question discriminate against a federally-protected interest. Department of

Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973).

If left standing, the decision below prevents a uniform application of the ICWA. Instead of applying to all tribal citizens, the ICWA's application will hinge on such factors as whether the Indian child ever lived on a reservation, attended a tribal cultural event or participated in a tribal religious ceremony. Such criteria could result in the ICWA applying to one child and not applying to another child of the same family. As is evident from this example, the "existing Indian family" exception adopted by the Court of Appeal, will prevent national uniformity in the federal scheme established by Congress in the ICWA and discriminate against those tribal citizens who have had minimal contact with their reservation and tribe. This Court cannot allow such a result to continue, as that would be inconsistent with the Supremacy Clause. U.S. CONST. art. VI, cl. 3.

B. The Decision Below Does Not Consider The Historical Relationship Between Tribal Governments And The United States.

As Chief Justice John Marshall observed in Cherokee Nation v. Georgia, 30 U.S. (Pet.) 1 (1831), "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . .. [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. Id. at 16. The government-to-government relationship between the Indian tribes and the United States is premised upon both the federal constitutional "plenary power" over Indian affairs, described in Arguments II and III above, but also upon the special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

Although the United States conduct towards the Indians is judged by the most exacting fiduciary standards, the United States has repeatedly adopted policies and legislation, the intent of which was to

assimilate the Indians into white society and bring an end to the tribes' reservations, governments and culture. (See, generally, F. Hoxie, *The Final Promise: The Campaign To Assimilate The Indians*, p. 1880-1920 (1984).)

The California Rancheria Act of 1958, 72 Stat. 619, as amended by Act of Aug. 11, 1964, 68 Stat. 390, was just such legislation. Its intent was to "terminate" the governmental status, the individual Indian status and the reservation status of forty-one Indian tribes in California. Duncan v. United States, 667 F. 2d 36 (Ct. cl. 1981), cert. denied 463 U.S. 1228 (1983). In implementing the Rancheria Act, the United States breached the specific provisions of the Rancheria Act and illegally terminated many of the forty-one Indian tribes named in the Act. See, e.g. Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977); and Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978).

The County of Appeal decision does not take into account the fact that many of the Indians in California were illegally terminated by the United States in the 1950's and 60's pursuant to the Rancheria Act. As a direct result, many of these Indians lost all political, social, and cultural contact with their tribal governments and reservations through forced government relocation programs and because their reservations and tribes were terminated. Id.

It would be a sad, ironic twist of fate, if Indians were deprived of the protections of the ICWA, a statute passed by Congress to protect tribal existence, because they could not prove to the satisfaction of a state court that they had maintained social, cultural and political ties with their tribe and reservation, when the very cause of those ties being severed was the illegal conduct of the United States. Id.

It has been fourteen years since the Kansas Supreme Court first adopted the "existing Indian family" exception to the ICWA. Matter of Adoption of Baby Boy L. (1982) 231 Kan. 199. Since that time, no less than six state courts of last resort have had an opportunity to consider the adoption or rejection of the exception with varying results. See,

Argument I above.

Until this Court decides this important issue of federal law, there will be no uniform national application of the ICWA and the intent and purpose of Congress in enacting the ICWA will be frustrated. For this reason, this Court should grant the Tribe's writ.

CONCLUSION

This case raises important jurisdictional issues pertaining to the constitutionality of the Indian Child Welfare Act and the authority of Congress to define who is an "Indian child" within the meaning of the ICWA. The decision below calls into question whether legislation enacted by Congress pertaining to Indians constitutes invidious racial discrimination.

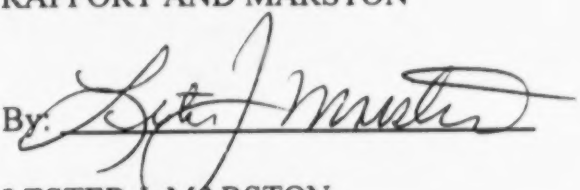
If left standing, the decision below has the potential of jeopardizing the entire political relationship between the United States and the Indian tribes by allowing states, acting through their state courts, to define, for the first time in the history of this nation, who is or is not an Indian.

If a U.S. citizen takes his one year old son to Japan to live for ten years, does the boy lose his United States' citizenship because he now speaks only Japanese, practices only the Buddhist religion and only goes to Japanese cultural and social events? No! Not without the child's father expressly relinquishing his son's United States Citizenship. Likewise, Lucy and Bridget R. have not lost their tribal citizenship simply because they have been placed, in violation of federal law, with a non-Indian couple. Richard A has never relinquished his tribal citizenship, he is an enrolled member of a federally recognized Indian tribe, as are his children. He is an Indian and his children are Indians as defined by Congress under the ICWA.

Because this case raises important constitutional issues of first impression, and for the other reasons stated above, this Court should grant the Tribe's petition for Writ of Certiorari.

Dated: August 13, 1996

Respectfully submitted,
RAPPORT AND MARSTON

By: 

LESTER J. MARSTON
ATTORNEYS FOR PETITIONER
DRY CREEK RANCHERIA

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re BRIDGET R., et al., Minors.	
JAMES R. AND COLETEE R., & VISTA DEL MAR, Petitioners and Appellants, v. CINDY R. AND RICHARD A. Objectors and Respondents. DRY CREEK RANCHERIA, ET AL., Intervenors and Respondents.	B093520 (Super.Ct.No. BN1980 consol. w/ BC114849)
In re BRIDGET R., ET AL., MINORS.	B093694
JAMES R. AND COLETTE R., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CINDY R., RICHARD A., AND DRY CREEK RANCHERIA, Real Parties in Interest.	

APPEAL from an order of the Superior Court of Los Angeles County. John Henning, Judge. Reversed and remanded with directions.

John L. Dodd and Jane A. Gorman for Petitioners and Appellants, the adoptive parents [identified in the opinion as the "R's"]; Michael F. Kanne for Petitioner and Appellant Vista Del Mar Child and Family Services.

James E. Cohen for Intervenor and Respondent, for Dry Creek Rancheria.

Mitchell L. Beckloff for Respondent Minors, Janette Freeman Cochran, Robert S. Gerstein, for Biological Parents, Farella, Braun & Martel, Norma G. Formanek, Jennifer Schwartz, Joan Heifetz Hollinger, Mark C. Tilden, Alexander & Karshmer, Barbara Karshmer, Sant' Angelo & Trope, Jack F. Trope, Robert J. Miller, Patricia D. Hinrichs, Dunaway & Cross, Michael P. Bentzen, Cary W. Mergele, Wylie, McBride, Jesinger, Sure & Platten, Christopher E. Platten, Marc Gradstein, Mark D. Fiddler, Todd D. Steenson and Randall B. Hicks as Amici Curiae.

California recognizes the principle that children are not merely chattels belonging to their parents, but rather have fundamental interests of their own. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) Such fundamental interests are of constitutional dimension. This principle is central to our resolution of the multiple and complex issues presented by this case.

We reverse an order of the trial court made pursuant to sections 1913 and 1914 of the Indian Child Welfare Act of 1978 (25 U.S.C.A. §§ 1901 et seq.; hereafter "ICWA" or "the Act"). The court's order invalidated a voluntary relinquishment of parental rights respecting Bridget and Lucy R., twin two-year-old girls, and ordered the twins removed from their adoptive family, with whom they have lived since birth, and returned to the extended family of the biological father. The adoptive parents (hereafter the "R's" or "adoptive parents") appealed,[1] joined by the licensed adoption agency through which the

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[1]A notice of appeal was filed by the R's on June 14,1995. On June 15, 1995, they filed a petition for writ of supersedeas or other appropriate stay of the trial court's order for an immediate transfer of custody. On that same date, we issued a temporary stay.

On June 21, 1995, the R's filed their Petition for Writ of Mandate, in which they raised the same issues as are raised on appeal. By three separate orders, each entered July 5, 1995, we (1) set a hearing on the petition for writ of supersedeas for July 19, 1995; (2) ordered proceedings on the petition for writ of mandate to be consolidated with the appeal and ordered the parties to appear before this court on October 18, 1995, to show cause why the writ of mandate should not be granted; and (3) ordered the appeal expedited and propounded questions to be addressed by the parties.

twins were placed.[2]

The twins are of American Indian descent, and the within dispute over their prospective adoption and custody raises issues concerning the scope of ICWA. Specifically, it raises the question of whether the Act should be limited in its application, as some courts have limited it, to children who not only are of Indian descent, but also belong to an "existing Indian family." (See, e.g., *In re Adoption of Crews* (1992) 118 Wash.2d 561 [825 P.2d 305]; *Matter of Adoption of Baby Boy L.* (1982) 231 Kan. 199 [643 P.2d 168].) We conclude that question must be answered in the affirmative.

ICWA was enacted by Congress to protect the best interests of Indian children and promote the stability of Indian tribes and families (25 U.S.C.A.§ 1902; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32-37 [104 L.Ed. 2d 29, 109 S.Ct. 1997]; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 408.) To

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On July 21, 1995, after the hearing of July 19 on the petition for writ of supersedeas, we granted the writ of supersedeas, staying all orders and judgments which are the subject of the appeal.

[2]The twins are separately represented and also have filed a responsive brief, in which they support the position of the adoptive parents and the adoption agency. This represents a change of position from the twins' position at trial. Indeed, the twins have been represented by three different attorneys over the course of these proceedings and have shifted sides in the controversy with each change of attorney. The attorney who originally was appointed to represent the twins filed pleadings on their behalf in which he argued that application of ICWA without holding a hearing on their best interests would deprive them of due process of law. When that attorney subsequently recalled that he had once been consulted by the adoption agency concerning this case, he was replaced by a second attorney, who took the opposite position. Counsel on appeal has returned to the position taken by the twins' first attorney.

this end, ICWA requires, among other things, that any voluntary termination of parental rights respecting an Indian child be (1) executed in writing, (2) recorded before a judge, and (3) executed more than ten days after the birth of the child. (25 U.S.C.A., § 1913, subd. (a).) Any consent not meeting these requirements is invalid and may be declared so at any time by a court of competent jurisdiction upon petition by the child, the Indian parent or custodian, or the child's tribe. (25 U.S.C.A., § 1914.)

Here, the twins' biological parents, Richard A. ("Richard") and Cindy R. ("Cindy"), initially relinquished the twins to appellant Vista Del Mar Child and Family Services ("Vista Del Mar") pursuant to section 8700 of California's Family Code for adoption by the R.'s, a non-Indian couple. However, Richard and Cindy later purported to withdraw their consent. With the assistance of the Dry Creek Rancheria of Pomo Indians, the federally recognized Indian tribe from which Richard is descended (hereafter, the "Tribe"), they initiated proceedings under ICWA to invalidate their relinquishments of parental rights. It is undisputed that the relinquishments were not executed in the manner required by ICWA. It is also undisputed that Richard and the twins are now recognized by the Tribe as tribal members. However, the record raises substantial doubt as to whether Richard, who, at all relevant times, resided several hundred miles from the tribal reservation, ever participated in tribal life or maintained any significant social, cultural or political relationship with the Tribe.

Although urged by Vista Del Mar and the R's to apply the "existing Indian family doctrine" in this case, and uphold the relinquishments of parental rights unless the biological parents established that they were such a family, the trial court declined to apply that doctrine or hold any hearing with respect thereto. The court simply declared the relinquishments invalid as violative of ICWA and ordered the twins placed in the custody of their paternal grandparents, who were appointed temporary guardians. The trial court also dismissed a petition by the adoptive parents to terminate the biological

parent's parental rights on the ground of abandonment. (Fam. Code, § 7822.) The court found ICWA precluded it from proceeding on that petition.

As we explain, recognition of the existing Indian family doctrine is necessary in a case such as this in order to preserve ICWA's constitutionality. We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe. Because the factual issues raised by such a rule have not been resolved, we reverse the trial court's order and remand the case for a determination of whether the twins' biological parents had such a relationship at the time that they voluntarily acted to relinquish their parental rights under California law. In the event that the trial court, after consideration of all the evidence, determines that such a relationship did not exist, then those relinquishments will be valid and binding and ICWA will not bar any pending adoption proceedings. On the other hand, if the trial court finds the biological parents did have a significant social, cultural or political relationship with the Tribe, and therefore the provisions of ICWA can properly be applied, then a further guardianship hearing will be required to resolve the question of whether the twins should be removed from the custody of the R's.

FACTUAL BACKGROUND[3]

Bridget and Lucy, twin girls, were born on November 9, 1993, in Los Angeles County, California, to Richard and Cindy. He is of

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[3]The facts we recite are taken from the record of testimony and other evidence presented to the trial court and are substantially undisputed.

American Indian descent, while she is descended from the Yaqui tribe of Mexico.[4] Richard is three-sixteenths Pomo and is currently an enrolled member of the Tribe.

The Tribe, which occupies a reservation in Sonoma County, in northern California, has approximately 225 enrolled members, of whom approximately twenty-five live on the reservation. Since 1973, the Tribe has been governed by a set of Articles of Association, which, among other things, establish the qualifications of tribal membership. Under the Articles, such membership includes all persons who (1) have completed an application for membership, and (2) are named in a June 4, 1915 Bureau of Indian Affairs census of Indians "in, near and up Dry Creek from Healdsburg" and Indians "in and near Geyserville," or are descendants of persons in those censuses, or are both California Indians and spouses of tribal members who hold valid assignments of land on the Rancheria. A person who is otherwise qualified to be a member is disqualified if he or she has been formally enrolled in another tribe, band or group, or has received an allotment of land by virtue of an affiliation with such other tribe, band or group. The Tribe's Board of Directors is responsible for maintaining a current membership roll.

Before the adoption of the Articles of Association in 1973, the Tribe was governed solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth. Marcellena Becerra, the tribal administrator, testified in the proceedings below that, when the Articles of Association were adopted, it was determined that existing members would continue to be recognized as members without the need to enroll formally. Thus,

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[4]At the time of oral argument, Cindy's attorney represented to the court that there is a federally recognized community of Yaqui Indians located in the state of Arizona. However, Cindy does not claim membership in that community.

although his name is not on the Bureau of Indian Affairs' enrollment list for the Tribe, Richard, who was born in 1972, is recognized as a tribal member according to pre-1973 customs. He became an enrolled member of the Tribe March of 1994, after the present custody dispute began, when his mother, Karen A. ("Karen"), submitted a membership application on his behalf.

In mid-1993, Richard and Cindy discovered that Cindy was pregnant. Richard was then 21 years old, and Cindy was 20. They then lived together with their two sons, Anthony, age two, and Richard Andrew, age one, in the city of Whittier in Los Angeles County, California. However, by August of 1993, Cindy and the children were living in a shelter. Richard and Cindy realized they would not be able care for the expected twins, and so determined to relinquish them for adoption. They consulted Durand Cook, an attorney specializing in adoption, for this purpose.

Richard initially identified himself to Cook as one quarter American Indian. However, when told the adoptions would be delayed or prevented if Richard's Indian ancestry were known, Richard filled in a revised form, omitting the information that he was Indian.

During the ninth month of Cindy's pregnancy, she and Richard met with a social worker from Vista Del Mar. On November 11 and 12 respectively, after receiving counseling concerning the relinquishment and adoption process as required by regulations promulgated pursuant to Family Code section 8621 (Cal. Code Regs., tit. 22, § 35128 et seq.), Richard and Cindy signed documents relinquishing the twins to Vista Del Mar, with the intent that they would be adopted by the R's.[5] The relinquishments were filed with

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[5] The record indicates that the R's paid approximately $14,000 to Cook for the birth mother's expenses, in addition to attorney's fees.

the state Department of Social Services on November 23, 1993.[6] Although the relinquishments were filed with relinquishment

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[6]Since January 1, 1994, the California statutes governing agency adoptions are found in Chapter 2 (§§ 8700 et seq.) of Part 2 of Division 13, "Adoption," of the Family Code. These statutes are substantially identical to statutes in the Civil Code, now repealed, which previously governed the same subject matter. Together with related statutes and regulations, they provide in pertinent part that: (1) Either or both biological parents may relinquish a child to a licensed adoption agency or the Department of Social Services (Fam. Code, § 8700, subd. ((a)); (2) the relinquishment must he executed after the child is born and when the birth mother has been released from the hospital or declared competent by her attending physician to execute a valid relinquishment (22 Cal.Code Reg. § 35139); (3) each relinquishing parent must also sign, in the presence of an agency representative and two additional adult witnesses, a "Statement of Understanding," indicating the parent's clear understanding of the effects of the relinquishment (22 Cal.Code Reg. §§ 35149; 35151(a)(2)(a)); (4) when executed in compliance with the above requirements, a relinquishment is final upon filing with the Department, and may be rescinded thereafter only by the mutual consent of the relinquishing parent or parents and the Department or licensed adoption agency (Fam. Code, § 8700, subd. (d)); (5) the biological parents may designate the prospective adoptive family, and, if the child is not placed with that family, may rescind the relinquishment within 30 days (Fam. Code, § 8700, subds. (e), (f) and (g)); (6) the filing of the relinquishment terminates all parental rights (Fam. Code, § 8700, subd. (h)); (7) a child who is relinquished should be placed with a relative, or, if a relative is not available, with a family of the same racial or ethnic background as the child, or, if no such family is available within 90 days of the relinquishment' after a diligent search, with any suitable family (Fam. Code, § 8708; (8) the above preferences need not be applied if the birth parents request otherwise (Fam. Code, § 8709); (9) a person who has been approved

documents contained direct queries as to whether either biological parent was of Indian descent, Richard concealed his Indian ancestry and listed his "basic ethnic group," as "`white."

A few days after the relinquishments were executed, the R's returned with the twins to their home in Ohio, where they have lived as a family 'ever since. On May 4, 1994, the R's filed a petition in Franklin County, Ohio to adopt Bridget and Lucy. That petition is presumably still pending.[7]

In December of 1993, Richard told his mother, Karen, about Cindy's pregnancy, the birth of the twins and their adoption. In early February of 1994, Karen contacted attorney Cook. At approximately the same time, Karen contacted the Tribe. A representative of the Tribe contacted Cook in February or March of 1994. Cook informed the R's of this communication. On March 4, 1994, Amy Martin, the Tribe's Chairperson, wrote to the Los Angeles County Children's Court, stating that the twins were potential members of the Tribe and

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by the Department or a licensed adoption agency to adopt a child may file a petition for adoption in the county where the petitioner resides (Fam. Code, §§ 8704, 8714); (10) if the prospective adoptive parents reside outside of California, they may file a petition for adoption in the state where they reside under the Interstate Compact on the Placement of Children (Fam. Code, § 7901).

It is undisputed that, but for the challenged application of ICWA, the biological parents' relinquishments of parental rights were valid and final under the above statutes as of November 23, 1993, the date when the relinquishments were filed with the Department of Social Services in Sacramento.

[7]The adoption of the twins in Ohio, after a relinquishment of parental rights in California, is authorized under the Interstate Compact on the Placement of Children (Fam. Code, § 7901.)

requesting intervention in any proceedings concerning them. On approximately that same date, Karen submitted tribal enrollment applications for herself, Richard, the twins, and Richard's two other children. On March 9, 1994, Amy Martin wrote to Vista Del Mar, stating that the twins were of Indian descent, and Karen, their paternal grandmother, wished them placed within the extended Indian family.

During these weeks and months, the relationship between Richard and Cindy was deteriorating. On April 27, 1994, Cindy obtained a restraining order, which required Richard to remain at least 100 yards from Cindy and their two sons, Anthony and Richard Andrew. In a declaration in support of her application for the restraining order, Cindy related that on numerous occasions during March, Richard hit and kicked Cindy and pushed her down, broke furniture, and abused the one- and two-year-old children by picking them up by the neck and shaking or dropping them, poking them in the face, or hitting them in the head. On at least one of these occasions, Richard was intoxicated.[8]

On April 22, 1994, Richard sent to Vista Del Mar a letter which stated that Richard wished to rescind his relinquishment of the twins and to have them raised within his extended family. This letter was drafted by Lorraine Laiwa, a member of the Tribe. Laiwa read the letter to Richard over the telephone. After he approved its contents, she mailed it to him for his signature. After signing the letter, Richard sent the original to Vista Del Mar and a copy to his mother. Richard later testified that his intent, when he signed the letter, was to place the twins with his sister.

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[8] The restraining order is included in the record on appeal, although it was not admitted into evidence in the proceedings below. At the request of the R's, we have taken judicial notice of the order and supporting documents. (Evid. Code,§ 452.)

On June 20, 1994, Richard had a meeting with Elias Lefferman, Ph.D., Director of Community Services at Vista Del Mar, concerning the request to rescind his relinquishment of the twins. During this meeting, Richard acknowledged that he had previously concealed his Indian ancestry. He stated that his decision to rescind his relinquishment of parental rights was prompted by his mother, Karen, so that Richard's sister could raise the twins. Vista Del Mar denied Richard's request to withdraw the relinquishments, and the proceedings that are now before us for review followed.[9]

CONTENTIONS

On appeal and in their petition for writ of mandate, the adoptive parents contend that: (1) the trial court erred in failing to recognize the "existing Indian family" doctrine and (2) ICWA is unconstitutional, unless limited by the "existing Indian family" doctrine, in that it (a) impedes the exercise of fundamental rights of adopted children and their adoptive families; (b) creates an impermissible racial classification, and (c) exceeds the enumerated powers of Congress and violates the Tenth Amendment.

In the alternative, the adoptive parents argue that, even if ICWA is constitutional and is not limited by the "existing Indian family" doctrine, the trial court's order must be reversed, because: (1) Richard is not a presumed father, (2) the Tribe is precluded from retroactively enrolling Richard and the twins as tribal members, (3) the twins are only 3/32 Indian, (4) the biological parents, having concealed Richard's Indian heritage in order to facilitate the adoption,

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[9]Such proceedings include: (1) a petition to declare the twins free of parental custody and control under Family Code section 7822, filed by the R's; (2) a motion to intervene, filed by the Tribe; (3) a complaint for declaratory relief, filed by Vista Del Mar; and (4) a petition to determine parental rights of alleged natural father under Family Code section 7662, filed by Vista Del Mar.

are estopped from invoking ICWA to prevent it and (5) ICWA's provisions do not defeat the requirement that a hearing must be held on the issue of whether a change of custody to the extended biological family is in the best interests of the children or will be a detriment to them.

DISCUSSION

1. *Summary of Relevant Portions of ICWA.*

ICWA, enacted by Congress to prevent the further "wholesale separation of Indian children from their families" through state court proceedings, was prompted by studies conducted in the 1970's which showed that Native American children were being removed from their homes, through both foster care and adoption, in disproportionate numbers. (*Mississippi Band of Choctaw Indians v. Holyfield, supra*, 490 U.S. at pp. 32-37.)

The Act is broken down into two titles. In this case, we are concerned only with Title I (25 U.S.C. §§ 1901 - 1923) which provides for the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the States and establishes federal standards to protect Indian families. Title II of the Act (25 U.S.C. §§ 1931 - 1963) provides for grants to Indian tribes and organizations to operate child and family service programs.

Sections 1901 and 1902 set forth the historical and policy bases of ICWA. The stated policies are to protect the best interests of Indian Children and protect the cultural heritage of Indian nations from destruction through the removal of children from Indian tribes. Section 1903 defines the Acts operative terms. An "Indian child" is defined as "any unmarried person who is under age eighteen and either (a) is a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a tribal member." (25 U.S.C. § 1903, subd. (4).) An "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of

Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians...." (25 U.S.C.A. § 1903, subd. (8).)

Section 1911, subdivision (a), gives an Indian tribe "exclusive jurisdiction as to any State over any child custody proceeding involving an Indian child who resides on or is domiciled within" the tribal reservation. When an Indian child who is not domiciled on a reservation is the subject of child custody proceedings in a state court, section 1911, subdivision (b), provides that, absent good cause, jurisdiction shall be transferred to the child's tribe upon request by either parent or the tribe. Subdivision (c) provides that an Indian child's tribe may intervene in any state court custody proceeding affecting the child. Subdivision (d) requires all jurisdictions within the United States to give full faith and credit to the acts of an Indian tribe that are applicable to Indian child custody proceedings.

Section 1912 provides standards for involuntary proceedings respecting the removal of Indian children from their homes. These include a requirement of clear and convincing evidence of a threat of serious harm before an Indian child may be placed in foster care or in the custody of a guardian (§ 1912, subd. (e)), and a requirement of proof beyond a reasonable doubt, supported by the testimony of qualified experts, of a threat of serious harm before parental rights respecting an Indian child may be terminated (§ 1913, subd. (f)).

Section 1913 sets forth standards for voluntary foster care placements and voluntary terminations of parental rights. Subsection (a) provides that Indian parents who relinquish their parental rights must execute the relinquishments in writing before a judge, who must certify that the proceedings were explained to the parents in a language they understand. Subsection (a) further provides that "Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid." Subsection (b) provides that a parent or Indian custodian may withdraw consent to a foster care placement at any time, and upon such withdrawal, the child must be returned.

Subsection (c) provides that a parent or Indian custodian may withdraw consent to termination of parental rights at any time until entry of a final order of adoption or termination, and upon such withdrawal, the child must be returned. Subsection (d) provides that a final court decree of adoption may be overturned at any time within two years of its entry if parental consent was obtained through fraud or duress.

Section 1914 of ICWA allows any Indian child, parent or Indian custodian from whom a child was removed, and the Indian child's tribe to petition a court of competent jurisdiction to invalidate a foster care placement or termination of parental rights upon a showing that such action violated any provision of sections 1911, 1912 or 1913.

2. *The "Existing Indian Family " Doctrine*

As noted above, ICWA applies to any child who is either: (1) a member of an Indian tribe, or (2) eligible to be a member, and the biological child of a member of a tribe. (§ 1903, subd. (4).) However, some courts have declined to apply the Act where a child is not being removed from an existing Indian family, because, in such circumstances, ICWA's underlying policies of preserving Indian" culture and promoting the stability and security of Indian tribes and families are not hindered. (*In re Adoption of Crews, supra*, 825 P.2d 305; *Matter of Adoption of Baby Boy L., supra*, 643 P.2d 168.)

The earliest case to articulate what later became known as the existing Indian family doctrine was *Matter of Adoption of Baby Boy L., supra*, 643 P.2d 168. In the case, the Kansas Supreme Court observed that the purpose of ICWA was to maintain family and tribal relationships existing in Indian homes and to set standards for removal of Indian children from an existing Indian environment. (643 P.2d at p. 175.) The court found that the child whose custody was at issue in that case had been relinquished by his non-Indian mother at birth and had never been in the custody of his Indian father. The child thus had

never been part of an Indian family relationship. Preservation of an Indian family was therefore not involved in the case; consequently, ICWA did not apply. (643 P.2d at p. 175; see also *Matter of Adoption of T.R.M.* (Ind., 1988) 525 N.E.2d 298, 303; *Claymore v. Serr* (S.D., 1987) 405 N.W.2d 650, 654; *In the Interest of S.A.M.* (Mo., 1986) 703 S.W.2d 603, 609; *Adoption of Baby Boy D.* (Ok., 1985) 742 P.2d 1059, 1064, cert. den. by *Harjo v. Duello* (1988) 484 U.S. 1072 [98 L.Ed.2d 1005, 108 S.Ct. 1042].)

While the above cases found ICWA inapplicable because the Indian child himself (or herself) had never lived in an Indian environment, other cases have focused upon the question of whether the child's natural family was part of an Indian tribe or community or maintained a significant relationship with one. In *Matter of Adoption of Crews, supra*, 825 P.2d 305, a case involving facts very similar to those before us, the Supreme Court of Washington found ICWA inapplicable to an adoption proceeding where the biological parents had no substantial ties to a specific tribe, and neither the parents nor their families had resided or planned to reside within a tribal reservation, although the birth mother was formally enrolled as a tribal member. In such a situation, the court found the application of ICWA would not further the Act's policies and purposes and would consequently not be proper. (825 P.2d at pp. 308-310, see also, *Hampton v. J.A.L.* (La.App., 2 Cir., 1995) 658 So.2d 331, 336, aff'd. by Supreme Court of Louisiana at 662 So.2d 478.)

In California, at least two courts have recognized the existing family doctrine. In *In re Wanomi P.* (1989) 216 Cal.App.3d 156, the court found ICWA inapplicable by its express terms, because the tribe to which the child's mother belonged was a Canadian tribe, not a federally recognized tribe, as required by section 1903, subdivision (8) of ICWA. (216 Cal.App.3d at p. 166.) However, the court also observed, in dictum that regulating the unwarranted removal of children from Indian families by nontribal agencies was among the objectives of ICWA, and no evidence suggested the existence of an Indian family from which the minor was being removed. (Id. at p.

168.) Thus, the court noted that there would be no occasion for an application of ICWA. (*Ibid.*) In *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, the majority found the baby's tribe had a right to intervene in adoption proceedings. However, the right of intervention existed under state law, independently of ICWA. (230 Cal.App.3d at pp. 1618-1619.) The court found that, upon remand of the action, the preferences for the placement of Indian children in Indian families or settings, which are provided in section 1915 of ICWA, need not be followed if the trial court found the child had no actual Indian family ties. (230 Cal.App.3d at pp. 1620-1621.)

Two other California courts, however, have refused to apply the existing Indian family doctrine, or at least that version of the doctrine which holds that ICWA applies only if the *child himself (or herself)* has lived in an Indian family or community. In *Adoption of Lindsay C., supra*, 229 Cal.App.3d 404, the court characterized the doctrine as follows: "Generally speaking, [the doctrine] hold[s] the Act inapplicable in adoption proceedings involving an illegitimate Indian child who has never been a member of an Indian home or Indian culture, and who is being given up by his or her non-Indian mother." (229 Cal.App.3d at p. 410.) The *Lindsay C.* court rejected the doctrine as so characterized (*Id.* at pp. 415-416.) The trial court had found the tribe of the child's unwed father had no right to notice of a pending step-parent adoption affecting the child, because he was the illegitimate child of a non-Indian mother, had always resided with the non-Indian mother, and had never been in the care or custody of the natural father, nor had any connection with Indian culture. Thus, without ever considering whether the natural father had significant ties with an Indian community, which he might one day share with the child if their family ties were not severed, the trial court concluded that no issue of the preservation of an Indian family was involved, as the child had never been a part of an Indian family. (*Id.* at p. 415.) The Court of Appeal rejected this reasoning and reversed. (*Id.* at pp 415-416.)

Likewise in *In re Junious M.* (1983) 144 Cal.App 3d 786, in a proceeding under (former) Civil Code section 232, the child's mother informed the court on the third day of trial that she was of Indian descent. (144 Cal.App.3d at pp. 788-789.) The court found the mother's tribe had a right to notice of the proceedings and a right to intervene, even though the minor had never lived in an Indian environment. "The language of the Act contains no [existing Indian family] exception to its applicability, and we do not deem it appropriate to create one judicially." (*Id.* at p. 796, citing *A.B.M. v. M.H.* (Alaska 1982) 651 P.2d 1170,1173.)"[10]

We agree that a rule which would preclude the application of ICWA to any Indian child who has not *himself (or herself)* lived in an Indian family does not comport with either the language or purpose of the Act. Moreover, the United States Supreme Court has implicitly rejected any such limitation on ICWA. In *Mississippi Band of Choctaw Indians v. Holyfield, supra*, 490 U.S. 30, the only case in which the federal high court has construed ICWA, application of the Act's tribal jurisdiction provisions (25 U.S.C.A. § 191 1, subd. (a)) was challenged by the adoptive parents of illegitimate twin babies

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[10]The biological parents argue that an additional California case, *In re Crystal K* (1990) 226 Cal.App.3d 655, also declines to apply the existing Indian family doctrine, but that characterization is not entirely accurate. In *Crystal K*, the court rejected the mother's contention that her action to terminate the parental rights of her former husband fell under the exception provided under the express terms of ICWA for custody proceedings that are part of a state proceeding for the dissolution of a marriage. (226 Cal.App.3d at p. 663-664.) The closest *Crystal K* came to rejecting the existing Indian family doctrine was to say that "To the extent *Wanomi P.* narrowly construes "Indian home" and "removal," we disagree with that court on the facts before us...." (Id at p. 665.) *Crystal K.* found that ICWA applied "even [under] *Baby Boy L.'s* [643 P.2d 168] characterization of the Act's purposes...." (*Ibid.*)

whose parents were enrolled members of an Indian tribe and were residents of the tribal reservation. (490 U.S. at pp. 37-38.) The babies were born off of the reservation and immediately relinquished to a non-Indian family, who adopted them in the state Chancery court. The birth mother returned home to the reservation after giving birth. On a subsequent motion by the tribe to vacate the adoption on the ground that the tribal court had exclusive jurisdiction over matters affecting the children's custody, the state court found the children had never resided, or even been physically present, on the reservation, and were thus not domiciled there. Consequently, the court found ICWA did not apply. (*Ibid.*) The Supreme Court reversed (*Id.* at p. 41), finding that (1) a general federal rule of domicile must apply for purposes of determining jurisdiction under ICWA (*Id.* at pp. 43-45); (2) under such rule, the children's domicile at birth followed that of their natural mother, and she was domiciled on the reservation (Id. at pp. 47-49); (3) therefore, the tribe had exclusive jurisdiction over custody proceedings affecting the children under section 1911, subdivision (a). (*Id.* at p. 53.)

Holyfield establishes, by clear implication, that an application of ICWA will not be defeated by the mere fact that an Indian child has not himself (or herself) been part of an Indian family or community. However, it does not follow from *Holyfield* that ICWA should apply when neither the child nor either natural parent has ever resided or been domiciled on a reservation or maintained any significant social, cultural or political relationship with an Indian tribe.[11] To the contrary, in our view, there are significant constitutional impediments to

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[11]We note in passing that Congress in 1987 failed to approve amendments to ICWA which were described in materials considered by the Senate Select Committee on Indian Affairs as having the effect of precluding application of the existing Indian family doctrine. (See Hearings before the Senate Select Com. on Indian Affairs, United States Senate, 100th Cong., 1st Sess. on Oversight Hearings on the Indian Child Welfare Act, Nov. 10, 1987, Appendix 8, pp 167-171).

applying ICWA, rather than state law, in proceedings affecting the family relationships of persons who are not residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects except genetic heritage, are indistinguishable from other residents of the state. These impediments arise from the due process and equal protection guarantees of the Fifth and Fourteenth Amendments and from the Tenth Amendment's reservation to the states of all powers not delegated to the federal government. We must, of course, construe the statute to uphold its constitutionality. (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council* (1983) 485 U.S 565, 575 [99 L.Ed.2d 645, 108 S.Ct. 1392], *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826.)

3. *Constitutional Limitations Upon the Scope of ICWA*

a. *Due Process*

The intent of Congress in enacting ICWA was to "protect the best interests of Indian children," as well as "promote the stability and security of Indian tribes and families." (25 U.S C. § 1902.) These two elements of ICWA's underlying policy are in harmony in the circumstance in which ICWA was primarily intended to apply--where nontribal public and private agencies act to remove Indian children from their homes and place them in non-Indian homes or institutions. (See 25 U.S.C. § 1901, subd, (4).) But in cases such as this one, where, owing to noncompliance with ICWA's procedural requirements, ICWA's remedial provisions are invoked to remove children from adoptive families to whom the children *were voluntarily given by the biological parents*, the harmony is bound to be strained. Indeed, in circumstances of this kind, the interests of the tribe and the biological family may be in direct conflict with the children's strong needs, which we find to be constitutionally protected, to remain through their developing years in one stable and loving home.

An individual's many related interests in matters of family life are compelling and are ranked among the most basic of civil rights. (*Quilloin v. Walcott* (1978) 434 U.S. 246, 255 [54 L.Ed.2d 511, 98 S.Ct. 549]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The United States Supreme Court has stated that "[t]he intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." (*Lehr v. Robertson* (1983) 463 U.S. 248, 256 [77 L.Ed.2d 614, 103 S.Ct. 985].) The high court has explained that its decisions which accord federal constitutional protection to certain parental rights rest upon "the historic respect--indeed, sanctity would not be too strong a term--traditionally accorded to the relationships that develop within the unitary family." (*Michael H. v. Gerald D.* (1989) 491 U.S. 110, 123 [105 L.Ed.2d 91, 109 S.Ct. 2333].)

Family rights are afforded not only procedural but also substantive protection under the due process clause. (*Meyer v. Nebraska*, 262 U.S. 390, 399-401 [67 L.Ed.1042, 43 S.Ct. 625] [law against teaching foreign languages in elementary schools did not serve sufficiently compelling public purpose to justify infringement of due process rights of students to acquire knowledge and of parents to control their children's education]; *Stanley v. Illinois* (1972) 405 U.S. 645, 649 [31 L.Ed.2d 561, 92 S.Ct. 1208] ["[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him...."]; *Santosky v. Kramer* (1982) 455 U.S. 745, 753 [71 L.Ed.2d 599, 102 S.Ct. 1388] ["When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."]; *Moore v. East Cleveland* (1977) 431 U.S. 494, 502 [52 L.Ed.2d 531, 97 S.Ct. 1932] [local ordinance which limited occupancy of a dwelling unit to members of a nuclear family violated Due Process Clause].) Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. (*Moore v. East Cleveland, supra*, 431 U.S. at

pp. 501-502; *In re David B.* (1979) 91 Cal.App.3d 184,192-193.) Legislation which interferes with the enjoyment of a fundamental right is unreasonable under the Due Process Clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of the purpose. In other words, such legislation would be subject to a strict scrutiny standard of review. (*Moore v. East Cleveland, supra*, 431 U.S. at p. 499; *Bates v. City of Little Rock* (1960) 361 U.S. 516, 524 [4 L.Ed.2d 480, 80 S.Ct. 412]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 83 S.Ct. 1790]; see also *Poe v. Ullman* (1961) 367 U.S. 497, 547 [6 L.Ed.2d 989, 81 S.Ct. 17521, dis. opn of Harlan, J.)

When discussing constitutional protections of family relationships, the courts have focused more often upon the rights of parents than those of children. The United States Supreme Court has declared that the interests "of a man in the children he has sired and raised . . .undeniably warrants deference" (*Stanley v. Illinois. supra*, 405 U.S. at p. 651; italics added) and that *parents'* interest in the "care, companionship, custody and management" of their children has "'a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' [Citation.]" (*Ibid.*, italics added, see also *Santosky v. Kramer, supra*, 455 U.S. at p. 753; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27 [68 L.Ed.2d 640, 101 S.Ct. 21531.) The California Supreme Court has likewise declared a parent's interest in the care, custody and management of his or her children to be "a compelling one, ranked among the most basic of civil rights." (*In re Marilyn H, supra*, 5 Cal.4th at p. 306; see also *Adoption of Kelsey S., supra*, 1 Cal.4th at pp. 830-848; *In re Angelia P.* (1981) 28 Cal.3d 908, 916.)

However, the courts have described the constitutional principles which govern familial rights in language which strongly suggests the Constitution protects the familial interests of children just as it protects those of parents. The federal high Court has said that "the relationship *between parent and child* is constitutionally protected" (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255; italics

added) and also has "emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." (*Lehr v. Robertson, supra*, 463 U.S. at p. 257.) Our own Supreme Court has stated that the right of parents to the care, custody and management of their children, although fundamental, is not absolute, and has stated that "[c]hildren, too, have fundamental rights--including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.' " (*In re Jasmon O., supra*, 8 Cal.4th 398, 419, quoting *In re Marilyn H., supra*, 5 Cal.4th at p. 306.) "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." *(In re Jasmon O., supra*, 8 Cal.4th at p. 419; italics added.)

Moreover, as a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships compose more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring. (See generally, *In re Jasmon 0., supra*, 8 Cal.4th at p. 419.)

Cases which hold that deference is to be accorded to parental rights do so in part on the assumption that children's needs generally are best met by helping parents achieve their interests. (*Santosky v. Kramer, supra*, 455 U.S. at pp. 759-761; *Stanley v. Illinois, supra*, 405 U.S. at p. 649; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-254; *In re Angelia P., supra*, 28 Cal.3d at pp. 916-917.) In some situations, however, children's and parents' rights conflict, and in these situations, the legal system traditionally protects the child. (*Cynthia*

D v. Superior Court, supra, 5 Cal.4th at p. 254; *In re Angelia P., supra*, 28 Cal.3d at p 917.)

Circumstances in which a parent's and child's interest diverge, and the child's interests are found more compelling, include circumstances where a child has been in out-of-home placement under the jurisdiction of a dependency court for 18 months, and the parent has failed to correct the problems which caused the child to be removed from the home (*In re Jasmon O., supra*, 8 Cal.4th at pp. 419-422; *Cynthia D. v. Superior Court, supra*, 5 Cal.4th at pp. 254-256.) In cases of this kind, the California Supreme court has ruled that a substantial likelihood that the child will suffer serious trauma if separated from the foster family can establish sufficient detriment to overcome the parents' right to the care, custody and companionship of the child. (*In re Jasmon O., supra*, 8 Cal.4th at pp. 418-419.) A child's right to remain in a stable home is also found both to be adverse to and to outweigh a parent's interests where a natural father failed to show a commitment to the child within a reasonable time of learning of the mother's pregnancy, but later seeks to assert parental rights and disturb an adoptive placement or step parent family in which the child is secure and thriving. *(Lehr v. Robertson, supra*, 463 U.S. pp. 261-262, *Quilloin v. Walcott, supra*, 434 U.S. at p. 255; *Adoption of Michael H.J supra*, 10 Cal.4th at pp. 1054-1058.) In such cases, the United States Supreme Court has ruled that the parental rights of the natural father are superseded by policies favoring preservation of the child's existing family unit. (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255.)

Both the California Supreme Court and the United States Supreme Court have also recognized that a person's interests and rights respecting family relationships do not necessarily depend upon the existence of a biological relationship. (*Lehr v. Robertson, supra*, 463 U.S. at p. 2613; *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1057-1058.) The United States Supreme Court has stated that "[n]o one would seriously dispute" that familial interests and rights may attach to the emotional ties which grow between members of a de

facto family. (*Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 844 [53 L.Ed.2d 14, 97 S.Ct. 2094].) Both high courts have recognized that such interests and rights may outweigh biological relationships under some circumstances. (*Lehr v. Robertson, supra*, 463 U.S. at p. 261, (*Quoilloin v. Walcott, supra*, 434 U.S. at p. 255; *Smith v. Organization of Foster Families, supra*, 431 U.S. at pp. 843-844; *Adoption of Michael H., supra*, 10 Cal.4th at pp. 1057-1058.)[12]

Here, the biological parents have come before the court after having voluntarily relinquished their twin girls for adoption. The biological parents claim they are entitled to reestablish their relationship with the children, because their relinquishments of parental rights were not executed in accordance with ICWA. However, any claim which they may have under the statute does not necessarily establish a claim to that deference which parental rights are generally accorded under the Constitution. A biological parent's constitutional rights, like other constitutional rights, may be waived, provided only that the waiver is knowingly and intelligently made

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[12]In *Smith v. Organization of Foster Families, supra*, 431 U.S. 816, the Supreme Court declined to find that the plaintiff foster parents had constitutionally protected interests in their relationships with the foster children. (431 U S. at p. 847.) One determinative factor which prevented such a finding was the fact that a foster parent" foster child relationship is the product of a "knowingly assumed" contractual relationship between the state and the foster parent, in which the foster parent agrees to the essentially temporary nature of the arrangement. (*Id.* at pp. 845-846.) However, the high court acknowledged that similar relationships may carry Constitutional protections in appropriate circumstances. (*Id.* at p. 844), and the court later cited language from *Smith* in the course of ruling that a natural parent's rights do not always take precedence over those of the children and their de facto families. (*Lehr v. Robertson, supra*, 463 U.S. at p. 261.)

(*D.H. Overmyer Co., Inc. v. Frick Co.* (1972) 405 U.S. 174, 185-186 [31 L.Ed.2d 124, 92 S.Ct. 775]; *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 545), and the counseling which is required by California law before a parent may relinquish a child for adoption has been held to be sufficient to assure that any waiver of parental rights is knowing and intelligent. *(Tyler v. Children 's Home Society, supra*, 29 Cal.App.3d at pp. 546-547.)

Given the failure to comply with procedural requirements of ICWA, we cannot conclude that there has been a waiver of parental rights in this case. However, as we have observed, prior judicial decisions establish that, where a child has formed familial bonds with a de facto family with whom the child was placed owing to a biological parents' unfitness (*In re Jasmon 0., supra*, 8 Cal.4th at p. 418) or initial failure to establish a parent-child relationship *(Lehr v. Roberston, supra*, 463 U.S. at p. 261; *Adoption of Michael H., supra*, 10 Cal.4th at p. 1057), and where it is shown that the child would be harmed by any severance of those bonds, the child's constitutionally protected interests outweigh those of the biological parents. (*Lehr v. Robertson, supra*, 463 U.S. at pp. 261-262; *Adoption of Michael H., supra*, 10 Cal.4th at pp. 1057-1058; *In re Jasmon 0., supra*, 8 Cal.4th at pp. 418-419.) The rule can logically be no different where children have become bonded to a family in which they were placed after a knowing, intelligent and express relinquishment of parental rights. Inasmuch as children have a liberty interest in the continuity and stability of their homes (*In re Jasmon 0., supra*, 8 Cal.4th at p. 419; *In re Marilyn H., supra*, 5 Cal.4th at p. 306), where a child's biological parents knowingly and intelligently relinquish the child to others for the express purpose of giving the child a loving and stable home, the biological parents' voluntary act constitutes at the very least a voluntary *subordination* of their constitutional rights to those of the children. The biological parents thus must rely solely upon ICWA for any claim which they might have in this matter.

The interests of the Tribe in this dispute are likewise based solely upon ICWA. There neither is nor can be any claim that the

Tribe's interests are constitutionally protected. The R's, as the prospective adoptive parents, similarly have no interests which have been found to enjoy constitutional protection. *(Smith v. Organization of Foster Families, supra*, 431 U.S. at pp, 838-847.)

However, the twins do have a *presently existing* fundamental and *constitutionally protected* interest in their relationship with the only family they have ever known. The children are thus the only parties before the court which have such interests. Therefore, if application of ICWA would interfere with those interests, such application must be subjected to a strict scrutiny standard to determine whether it serves a compelling government purpose and whether it is actually necessary and effective to the accomplishment of that purpose. If not, then ICWA, as so applied, would deprive the children of due process of law. (*Moore v. East Cleveland, supra*, 431 U.S. at p. 499; *Bates v. City of Little Rock, supra*, 361 U.S. at p. 524; *Sherbert v. Verner, supra*, 374 U.S. at p.406.)

The questions which we therefore must determine are (1) whether the tribal interests which ICWA protects are sufficiently compelling under substantive due process standards to justify the impact which ICWA's requirements will have on the twins' constitutionally protected familial rights, and, if so, (2) whether application of ICWA, under facts of the kind presented in this case, is necessary to further that interest.

We have no quarrel with the proposition that preserving American Indian culture is a legitimate, even compelling, governmental interest. At the same time, however, we agree with those courts which have held that this purpose will not be served by applying the provisions of ICWA which are at issue in this case to children whose biological parents do not have a significant social, cultural or political relationship with an Indian community. It is almost too obvious to require articulation, that "the unique values of Indian culture" (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture.

This being so, it is questionable whether a rational basis, far less a compelling need, exists for applying the requirements of the Act where fully assimilated Indian parents seek to voluntarily relinquish children for adoption. The case for applying ICWA is even weaker where assimilated parents have previously concluded a reasoned and voluntary relinquishment of a child, which was valid and has become final under state law, and the child has become part of an adoptive or prospective adoptive family. In this circumstance, the invalidation of the relinquishment manifestly can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he or she is loved and well cared-for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow. ICWA cannot constitutionally be applied under such facts.

b. *Equal Protection.*

ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation. As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers. To the extent this disparate and sometimes disadvantageous treatment is based upon social, cultural or political relationships between Indian children and their tribes, it does not violate the equal protection requirements of the Fifth and Fourteenth Amendments. (*United States v. Antelope* (1977) 430 U S. 641, 646 [51 L.Ed.2d 701, 97 S.Ct. 1395]; *Moe v. Salish Kootenai Tribes* (1976) 425 U.S. 463, 480-481 [48 L.Ed.2d 96, 96 S.Ct. 1634]; *Morton v. Mancari* (1974) 417 U.S. 535, 554 [41 L.Ed.2d 290, 94 S.Ct. 2474].) However, where such social, cultural or political relationships do not exist or are very attenuated, the only remaining basis for applying ICWA rather than state law in proceedings affecting an Indian child's custody is the child's genetic heritage--in other

words, race.

Equal protection principles regard racial classifications of all kinds as "inherently suspect" *(Regents of the Univ. of California v. Bakke* (1978) 438 U.S. 265, 289-290 [57 L.Ed.2d 750, 98 S.Ct. 2733] (lead opn. of Powell, J.)), indeed, "odious to a free people." (*Hirabayashi v. United States* (1943) 320 U.S. 81, 100 [87 L.Ed. 1774, 63 S.Ct. 1375].) The United States Supreme Court has recently held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *(Adarand Constructors, Inc. v. Pena* (1995) _U.S._ [132 L.Ed.2d 158, 182, 115 S.Ct. 2097] (hereafter "Adarand"; lead opn. of O'Connor, J.); see also *Miller v. Johnson* (1995) _U.S. _ [132 L.Ed.2d 762, 115 S.Ct. 2475, 2482]) The same principle applies whether the group targeted by a racial classification is burdened or benefited by the classification. (*Adarand, supra*, 132 L.Ed.2d at p. 179.) The foregoing principles apply to federal legislation affecting Indian affairs *(Delaware Tribal Business Commission v. Weeks* (1974) 430 U.S. 73, 84 [51 L.Ed.2d 173, 97 S.Ct. 911].)

The Tribe and the biological parents argue that ICWA does not create a race-based classification, because application of ICWA is triggered by the child's *membership* in a tribe or eligibility for membership, and depends upon the child's genetic heritage only if the child is merely eligible for tribal membership, in which case the child must be the biological child of a tribal member. This argument is superficially appealing. However, the Tribe and the parents also argue that, under ICWA Guidelines, tribal determinations of their own membership should generally be deemed conclusive. If tribal determinations are indeed conclusive for purposes of applying ICWA, and if, as appears to be the case here, a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe

may be claimed by the Tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. Only children who are racially Indians face this possibility.[13]

For purposes of determining whether a particular application of ICWA creates a racially based classification, it makes no difference that not all tribes recognize as tribal members all blood descendants of tribal members. (See, e.g, *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 52-53 [56 L.Ed.2d 106, 98 S.Ct. 1670][tribe denied tribal membership to the children of female tribal members who married outside the tribe, but not to the children of similarly situated male tribal members].) As we have observed above, to the extent that tribal membership within the meaning of ICWA is based upon social, cultural or political tribal affiliations, it meets the requirements of equal protection. However, any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause. So scrutinized, and for the same reasons set forth in our discussion of the due process issue, it is clear that ICWA's purpose is not served by an application of the Act to children who are of Indian descent, but whose parents have no significant relationship

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[13]There may, of course, be instances in which an Indian tribe admits a non-Indian as a tribal member, and, in such cases, that member's biological children may fall within ICWA's definition of Indian children even if they have no Indian blood. However, grant of tribal membership to a non-Indian would plainly be based upon some social, cultural or political bond which the non-Indian established with the tribe. The decision we must make is whether ICWA is constitutionally over broad if applied to racially Indian children whose families have social, cultural or political relationship with a tribal community.

with an Indian community. If ICWA is applied to such children, such application deprives them of equal protection of the law.

c. *The Indian Commerce Clause And The Tenth Amendment.*

Congress's authority to enact ICWA arises from clause 3 of section 8 of article I of the Constitution, "The Congress shall have power . . . to regulate Commerce . . . with the Indian tribes." (25 U.S.C.A. § 1901, subd. (1), *In re Wanomi P., supra*, 216 Cal.App 3d at pp. 162-163.) This clause grants Congress plenary power over Indian affairs. (*United States v. Wheeler* (1978) 435 U.S. 313, 318 [55 L.Ed.2d 303, 98 S.Ct. 1079]; *Morton v. Mancari, supra*, 417 U.S. at pp. 551-552; *Worcester v. State of Georgia* (1831) 31 U.S. (6 Pet.) 515, 559 [8 L.Ed. 483].) Indian tribes are deemed to be semi-sovereign nations under the protection of the federal government. Tribes retain attributes of sovereignty over both their members and their territories; such sovereignty is dependent on, and subordinate to, only the Federal Government, not the states. (*California v. Cabazon Band of Indians* (1987) 480 U.S. 202, 207 [94 L.Ed.2d 244, 107 S.Ct. 1083]; *Washington v. Confederated Tribes* (1980) 447 U.S. 1349 153-154 [65 L.Ed.2d 10, 100 S.Ct. 2069].)

The principles of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seek an accommodation between the interests of the tribes and the federal government on the one hand, and those of the states, on the other. (*Washington v. Confederated Tribes, supra*, 447 U.S. at pp. 156-157.) Thus, the Supreme Court has held nonreservation Indians are generally subject to nondiscriminatory and generally applicable state laws [a]bsent express federal law to the contrary." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149 [36 L.Ed.2d 114, 93 S.Ct. 1267].) Even on Indian reservations, state laws generally may be applied insofar as they do not interfere with reservation self-government or essential internal tribal affairs, or impair a right reserved by federal law. (*Id.* at p. 148.)

Jurisdiction over matters of family relations is traditionally reserved to the states. (*Rose v. Rose* (1987) 481 U.S. 619, 625 [95 L.Ed.2d 599, 107 S.Ct. 2029]; *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 511-512 [73 L.Ed.2d 928, 102 S,Ct. 3231]; *In re Burris* (1890) 136 U.S. 586, 593-594 [34 L.Ed. 500, 10 S.Ct. 850].) Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do "major damage" to "clear and substantial federal interests." [Citations]." *(Rose v. Rose, supra*, 481 U.S. at p. 625.)

Under these principles, ICWA should apply rather than state laws respecting family relations only where such application actually serves the specific purposes for which ICWA was enacted, "to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902), or the broader purposes which are served by all authorized exercises of Congressional power under the Indian Commerce Clause, namely, the purposes of acting as a guardian to the Indian tribes, and in so doing, protecting Indian tribal self-government. (*Morton v. Mancari, supra*, 417 U.S. at pp. 553-554.)

The recent case of United States v. Lopez _U.S._ [131 L.Ed.2d 626, 115 S.Ct. 1624) is instructive, although that case concerned the powers of Congress under the Interstate Commerce Clause, and the reach of the Indian Commerce Clause is not identical. In *Lopez*, the United States Supreme Court indicated that Congress's power under the Interstate Commerce Clause to legislate in areas otherwise reserved to the states will be confined to matters which substantially affect interstate commerce. (115 S.Ct. at p. 1630.) The reasoning of *Lopez* logically applies with respect to the Indian Commerce Clause, indeed, to any enumerated power of Congress. Congress exceeds its authority when, acting under any of its enumerated powers, Congress legislates in matters generally within the jurisdiction of the states, in the absence of an adequate nexus to

the enumerated power under which the legislation is enacted. (Cf. 115 S.Ct. at pp. 1631-1634.)

No such nexus exists respecting application of ICWA to children whose families do not maintain significant relationships with an Indian tribe or community or with Indian culture. Once again, ICWA's purpose simply is not furthered by an application of the Act to families who are of Indian descent, but who maintain no significant social, cultural or political relationships with Indian community life, and are in all respects indistinguishable from other residents of the state. Thus, if ICWA is applied to such children, that application impermissibly intrudes upon a power reserved to the states.

d. *Conclusion.*

We do not believe ICWA applies only to Indian children who are domiciled on reservations. Indeed, the Act's express terms provide for application of most of its provisions to reservation-domiciled and nonreservation-domiciled Indians alike. (§ 1911, subds. (b) and (c).) Only the provision for exclusive jurisdiction in the tribal court is restricted to reservation domicilaries. (§ 1911, subd. (a).) However, if the Act applies to children whose families have no significant relationship with Indian tribal culture, such application runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the states, (2) it improperly interferes with Indian children's fundamental due process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children and exposes them, like the twin girls in this case, to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under ICWA (which rights were, in this case, specifically and intentionally ignored by the biological parents now asserting them). All of this occurs in the absence of even a rational relationship to a permissible state purpose, much less a necessary connection with a compelling state purpose.

We conclude that principles of substantive due process, equal protection and federalism all carry the same implication regarding the proper scope of ICWA--it can properly apply only where it is necessary and actually effective to accomplish its stated, and plainly compelling, purpose of preserving Indian culture through the preservation of Indian families. We agree with those courts which have held that ICWA's purpose is not served by an application of the Act where the child may be of Indian descent, but where neither the child nor either parent maintains any significant social, cultural or political relationships with Indian life.

4. *The Trial Court Must Determine The Question Of Whether There Was An "Existing Indian Family" Which Is The Factual Predicate To The Application Of ICWA.*

The trial court in this case determined, as a matter of law, that the twins are Indian children, because they are enrolled members of the Tribe, are recognized by the Tribe as members and are the biological children of an enrolled and recognized tribal member. The trial court thus concluded that ICWA applies, and the biological parent's relinquishment of the twins for adoption was invalid under section 1913 of the Act. However, more is required to justify an application of ICWA than a biological parents' mere formal enrollment in a tribe, or a self-serving after-the-fact tribal recognition of such a parent's membership. Such token attestations of cultural identity fall short of establishing the existence of those *significant* cultural traditions and affiliations which ICWA exists to preserve, and which are consequently necessary to invoke a constitutionally permissible application of the Act.[14]

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[14]This conclusion is consistent with the ICWA regulations and case authority. The "Guidelines for State Courts; Indian Child Custody Proceedings" ("ICWA Guidelines,") 44 Federal Register, pages 67584 through 67595 (November 26, 1979) suggest that tribal determinations of their own membership are ordinarily deemed conclusive. However,

Because the trial court was persuaded that enrollment in the Tribe and tribal recognition of the twins' tribal membership were enough to trigger the application ICWA, the court had no occasion to make a further factual determination as to whether the biological parents maintain significant social, cultural or political relationships with the Tribe. The case must therefore be remanded so that such factual determination can be made.

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tribal rights under the Guidelines also depend upon the existence of an actual political relationship with the tribe. (44 Federal Register at p. 67587.) Federal cases which generally consider the special rights which arise from a person's status as an Indian have held that enrollment in, or recognition by, a tribe is not the sole factor in determining Indian status. (See, e.g., *Morton v. Ruiz* (1974) 415 U.S. 199, 295 [39 L.Ed.2d 270, 945.Ct. 1055] [evidence of close economic and social ties to tribe required invalidation of Bureau of Indian Affairs rule which denied federal benefits to Indian family who lived off of the tribal reservation]; *United States v. Broncheau* (9th Cir. 1979) 597 F.2d 1260, 1263, cert. denied by *Broncheau v. U.S.* (1979) [62 L.Ed. 80, 100 S.Ct. 123] [enrollment is the common evidentiary means of establishing Indian status for purposes of the Major Crimes Act, but is not the only means and is not necessarily determinative]; *Ex party Pero* (7th Cir. 1938.) 99 F.2d 28, 29-31, cert. denied by *Lee v. Pero* (1939) 306 U.S. 643 [83 L.Ed. 1043, 59 S.Ct. 581][defendant was *not* an enrolled member of his tribe, but he was nevertheless an "Indian" for purposes of conferring federal criminal jurisdiction where he lived on the tribal reservation, maintained tribal relations and was recognized as an Indian by the tribe].) Daniel Cohen's authoritative *Federal Handbook of Indian Law* (Univ. of New Mexico Press, 1971) ("*Federal Handbook*") also expresses the view that tribal of membership is best treated "as a relative affair, existing in some cases for certain purposes and not for others." (Cohen, *Federal Handbook* at p. 136.)

The biological parents (and the Tribe), of course, will bear the burden of proof on this issue. It is they who seek to set aside the relinquishment of parental rights which were otherwise final and binding under California law. To do this they rely on the application of a federal statute. It is they who must prove that the necessary factual basis for the application of that statute is present. (Evid. Code, § 500.)

Moreover, that determination must focus upon the biological parents' social, cultural and political relationship within the Tribe, although any relationship between the Tribe and extended family members may well bear on the issue of the biological parents' relationship. On this point, we agree, with the Supreme Court of South Dakota, writing in *Claymore v. Serr, supra.* 405 N.W.2d 650, one of the early cases to apply the existing Indian family doctrine. The *Claymore* court observed that ICWA refers in some contexts to "Indian families" and in others, to "extended Indian families," suggesting that when the former term is used, the nuclear family, "the fundamental social unit in civilized society," is intended. (405 N.W.2d at pp. 653-654.)

The biological parents and the Tribe contend it would be unfair to focus only upon the nuclear family when assessing an application of ICWA, because such focus would ignore tribal kinship systems, in which the extended family is a fundamental unit. The parents and Tribe argue that one of the primary reasons ICWA was enacted was to combat the adverse effects upon Indian communities of failures by state courts and agencies to appreciate the importance in tribal life of the extended family, as well as other customs and institutions affecting the welfare of Indian children. They thus argue, in effect, that to exclude the extended family from consideration when we determine whether there is an existing Indian family, and hence, whether ICWA applies, would be a mere analytical sleight of hand, by which ICWA's requirements of giving due consideration to essential tribal relations would be unfairly sidestepped.

After giving this argument long and careful consideration, we are compelled to disagree. First, it implicitly assumes the conclusion that the biological parents did have significant social, cultural or political connections to the Tribe. If they had no such connections, then there would be no real issue of an "extended Indian family" for the court to ignore. Secondly, and more significantly, it must not be forgotten that this case has arisen because the biological parents *abjured* their Indian heritage when, instead of turning to their extended family for succour and support in anticipation of the twins' birth, they voluntarily, and for rational and understandable reasons, relinquished those children to strangers. Then, to prevent interference with those relinquishments by the Tribe, they *denied* their heritage in response to multiple direct inquiries. Having done these things, the biological parents may now justly be required to prove that they themselves have a significant relationship with an Indian community and may be precluded from using cultural ties which may be maintained by their blood relatives to bootstrap themselves into an application of ICWA.

The determination whether the twins were removed from a existing Indian family must also be made as *of the time of the relinquishments*. There can be no justification or excuse for tearing children from a family to which they are bonded, based upon an ex post facto manufacture of a legal basis for applying ICWA. The R's urge us to hold that contemporaneous enrollment in the tribal register is necessary to establish that a child's biological parent is a member of an Indian tribe within the meaning of ICWA. While such a bright-line rule has much to recommend it, we can imagine circumstances in which it would work an injustice, and we decline to "pounce such a rule. Nevertheless, the circumstance that Richard's mother Karen--not Richard himself--applied for tribal enrollment for herself, Richard and all his children *after* the present dispute arose is a circumstance which can be considered in determining whether Richard truly maintained a significant relationship with the Tribe at the time of the twins' birth.

In considering whether the biological parents maintained significant ties to the Tribe, the court should also consider whether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in Tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe. In this regard, we find particularly significant the fact that in the months preceding the birth of the twins, the biological parents turned not to the Tribe or even to other family members,[15] but rather to California's legal process for the purpose of securing the adoption of the twins by a loving family able to care for them. The biological parents did this voluntarily and for reasons which reflected that their primary concern was for the twins' future welfare. Moreover, as already noted, in order to facilitate the adoption process the biological parents expressly and intentionally denied their Indian heritage. Such conduct permits a very strong inference to be drawn about the *absence* of a significant relationship with the Tribe.

5. *If the Trial Court Finds That ICWA Applies, Then a Further Hearing Must Be Held on Whether a Change of Custody Would Be Detrimental to the Twins.*

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[15]We cannot help but note that Richard's mother, Karen, who appears from the record to be the prime mover in this matter was never made aware of the fact of Cindy's pregnancy until nearly two months after the twins were born. This strongly suggests a family relationship which involved very little social contact. A pregnancy involving twin babies would be difficult to disguise. It would appear that this was a matter which Richard intentionally chose not to share with his mother.

In anticipation of the possibility that the trial court might, upon remand, conclude that ICWA does apply, the R's have filed, and there is now pending in the trial court, a petition for their appointment as guardians of the twins.[16] The biological parents and the Tribe dispute that such a procedure is appropriate.[17] The R's respond that a hearing on their guardianship petition is required in order to protect the constitutional rights of the twins and, in any event, is not precluded by the provisions of ICWA.[18]

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[16]At the R's request and without objection we have taken judicial notice of the pendency of that proceeding.

[17]Following oral argument on this matter we invited the parties and amici to address by letter brief the issue of the proper procedure to be followed by the trial court in the event that, upon remand, it was determined that ICWA did apply to this case. We have received and considered such additional briefing.

[18]The R's also contend that they are entitled to a hearing on their claim that the twins were abandoned by their birth parents. While that may be technically true, the undisputed record strongly suggests that no abandonment can be proven. In order for the R's to prove abandonment, it would be necessary for them to establish that the biological parents, with the intent to abandon the children, left them in the care of the R's for a period of six months. (Fam. Code, § 7822.) Although Richard manifestly began attempting to have the twins returned to him within six months after their birth, the R's contend he abandoned them within the meaning of the statute, because he did not intend to receive them into his own home, but intended that his sister would raise them. The R's cite *In re Brittany H.* (1988) 198 Cal.App.3d 533 for the proposition that a biological parent who consents to an adoption, then attempts to reclaim the child within six months, will still be found to have abandoned the child if the parents intent in reclaiming the child was not to parent the child himself (or

However, the biological parents and the Tribe contend that, if the trial court ultimately finds that ICWA applies, then (1) the relinquishments of parental rights would be invalid, (2) no basis for an involuntary termination of rights would exist and (3) the twins would have to be returned to the biological parents, without further proceedings. In support of this contention, they cite ICWA sections 1913, subdivision (c), and 1920, as well as Family Code sections 8804 and 8815 and two California cases, *In re Timothy W.* (1990) 223 Cal.App.3d 437 and *In re Cheryl E.* (1984) 161 Cal.App.3d 587.

The California authorities cited are inapposite. Family Code sections 8804 and 8815 are part of the statutory scheme governing independent adoptions and have no application outside of that scheme.[19] For the same reason, *In re Timothy W., supra*, has no

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herself), but to place the child in another adoptive home. (See 198 Cal.App.3d at pp. 550-551.) While *Brittany H.* does so hold, it is distinguishable in one crucial respect from this case: The mother in *Brittany H.* attempted to reclaim the child from her adoptive home and place her in the home of other people whom the mother had come to prefer, but who were not biologically related to the child and had no other particular claim to the child. (*Id.* at p. 550.) Here, Richard sought to reclaim the twins and place them, not with strangers, but with his sister, a person entitled to preference in the placement of Indian children under ICWA. (25 U.S.C. § 1915.) It would subvert the clear purposes of ICWA if a finding of abandonment could be premised upon the desire of the biological parent of an Indian child to place the child with a member of his extended Indian family.

[19]Section 8804 provides manner of determining the custody of a child who has been placed for adoption if the prospective adoptive family withdraws the petition for adoption, if a birth parent who did not place the child for adoption does not consent to the adoption, or if a birth parent who placed the child for adoption revokes consent pursuant to section 8814.5. In the latter two circumstances, the child

application to this case. In *Timothy W.*, the court held that under the Civil Code statutes which formerly governed independent adoptions, a parent who withdrew consent to an adoption within six months was entitled to have the child returned without the need for judicial findings on the child's best interests. (223 Cal.App.3d at p. 441.) *In re Cheryl E., supra*, is also distinguishable. In that case, the Court of Appeal affirmed a trial court order granting the mother's petition to rescind her relinquishment of parental rights on the ground of fraud and undue influence (161 Cal.App.3d at p. 594); the appellate court found there was no occasion in the rescission action for the child's best interests to be considered, and noted that this issue would be addressed in a separate dependency proceeding, which was pending. (*Id.* at pp. 603-604.)

The contention that ICWA, section 1913, subdivision (c), requires automatic return of the children to the biological parents has somewhat more force. That section provides that "[i]n any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, *and the child shall be returned to the parent.*" (Italics added.) If ICWA applies in this case, then no valid decree or other document effecting a termination of parental rights has been entered, and the biological parents have long since withdrawn their consent. Thus, the Tribe argues, section 1913, subdivision (c), requires the immediate and unconditional return of the children to their biological family.

We disagree. The reach of section 1913 is limited by the twins' interest in having a stable and secure home which, as we have

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must be returned to the birth parent. Likewise, section 8815 provides for the mandatory return of the child to a birth parent who revokes consent to an independent adoption before the revocable consent becomes permanent.

already concluded, is an interest of *constitutional* dimension. Inasmuch as an individual's interests in matters of family life are "compelling and are ranked among the most basic of civil rights" (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255), and inasmuch as children "are not simply chattels belonging to the parent," but have fundamental, constitutionally protected interest of their own, including "the fundamental right to . . have a placement that is stable [and] permanent" (*In re Jasmon O., supra*, 8 Cal.4th at p. 419), we believe it would constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement, based upon statutory violations which occurred in making the placement, without a hearing to determine whether the child would suffer harm if removed from that placement. (*Stanley v. Illinois, supra*, 405 U.S. at p. 649.) Such a constitutional mandate cannot be avoided by reliance on the *statutory* provisions of ICWA.

However, even under ICWA a change of custody hearing can be justified. Most of its provisions which deal with the custody of children expressly provide that consideration must be given to the child's interests before any order changing a child's custody is made. For example, section 1916, subdivision (a), deals with the issue of return of custody in circumstances substantially like those presented here.[20] It speaks directly to what happens after "a final decree of adoption of an Indian child has been vacated." We do not have that precise situation here; however, we do have something very close: the

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[20]Section 1916, subdivision (a), of ICWA provides: "Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child."

invalidation of a voluntary relinquishment of parental rights. In both situations, custody of the child would in all likelihood have been given over to the prospective adoptive parents prior to any determination of invalidity. If, because of the application of ICWA, a final adoption is invalidated, or, as in this case, made impossible, the problem is the same: what is to be done about custody? Section 1916, subdivision (a), contemplates and provides something very similar to the procedure which we will require here in the event that the trial court finds that ICWA applies to this case.

Two other sections of ICWA also recognize the importance of the child's interests and needs. Section 1915 provides preferences for the placement of Indian children, but authorizes a different placement if there is good cause and specifically requires that any special needs of the child be considered in making a placement. (§ 1915. subds. (a) and (b).) Section 1915, subdivision (c) authorizes a child's Tribe to specify different preferences, but requires any placement so specified to be "the least restrictive setting appropriate to the particular needs of the child." Section 1920, which prescribes the consequences of an improper removal of a child from the legal custodian, and which the Tribe and biological parents contend requires automatic return of the child, provides that such return need not be ordered if it would subject the child to substantial and immediate danger, or the threat thereof.

In the context of these express provisions within ICWA for consideration of the child's interests in making a custody order, it does no violence to the overall statutory scheme to imply such a provision where it is contended that a child's custody must be changed pursuant to section 1913, subdivision (c), due to a violation of section 1913, subdivision (a).[21] This result is not inconsistent with the intent of

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[21]Where the biological parent of an Indian child has validly relinquished parental rights under section 1913, subdivision (a), and all parties to the proceedings understand and agree that the Congress.

The legislative history of ICWA reflects the following comment in the House Report of the Interior and Insular Affairs Committee of July 24, 1978: "[T]he committee notes that nothing in those subsections [referring to the subsections of section 1913] prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section [1912], to prevent the return of the child, but does not wish to

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relinquishment may be rescinded for any reason at any time until the termination of parental rights is final, there is a logical reason to provide for automatic return of the child to the biological parent, although changes of custody in all other circumstances contemplated by ICWA are contingent upon findings respecting the child's best interests and the likelihood of detriment to the child. Moreover, where the risk of removal of the child from a pre-adoptive placement is knowingly and voluntarily assumed by the prospective adoptive family, due process in all likelihood does not require a hearing on the child's best interests before a removal can be ordered. (Cf. *Smith v. Organization of Foster Families, supra*, 431 U.S. 816 ["While the Court has recognized that liberty interests may in some cases arise from positive law sources [Citations], in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional liberty' interest"].) However, the circumstances are different where, as here, an adoption is stymied for reasons that were neither anticipated nor voluntarily agreed upon by the parties, and where the children's custody status would have been permanently settled, but for the unanticipated obstruction. In such circumstances, the most reasonable course is to make a custody order only after weighing the relative rights and interests of the parties--most particularly those of the children.

be understood as *routinely* inviting such actions." (1978 U.S. Code Cong. & Admin. News, at p. 7546; italics added.)[22]

Finally, there is significant case authority for such a custody hearing. The R's and amicus curiae have cited authorities from Colorado, New Jersey and New Mexico, in which the courts recognize that, where an anticipated adoption cannot legally be effected, the child's interests must nevertheless be considered before custody of the child is returned to the biological parent (See *Matter of Custody of C.C.R.S.* (Colo. 1995) 892 P.2d 246. 257-258, cert. denied by *C.R.S. v. T.A.M.* (1995) __U.S.__ [133 L.Ed.2d 69, 116 S.Ct. 118]; *Matter of Adoption of J.J.B.* (1995) 119 N.M. 638 [894 P.2d 994, 1008-1009] cert. denied by *Bookert v. Roth* (1995) __U.S.__ [133 L.Ed 2d 110, 116 S.Ct. 168]; *Sorentino v. Family Children 's Soc. of Elizabeth* (1976) 72 N.J. 127 [367 A.2d 1168, 1170-1171].) The California Supreme Court has also suggested in dictum that where a parent, having the right to do so, vetoes an anticipated adoption, the question of whether custody of the child should be awarded to the parent is a matter for separate determination. (*Adoption of Kelsey S., supra*, 1 Cal.4th at p 851 ["Even if petitioner has the right to withhold his consent (and chooses to prevent the adoption), there will remain the question of the child's custody"].) The Alaska Supreme Court reached the same conclusion in a case involving ICWA. In *A.B.M. v. M.H., supra*, 651 P.2d 1170, cert. denied by *Hunter v. Maxie* (1983) 461 U.S. 914 [77 L.Ed.3d 283, 103 S.Ct. 1893] the adoption of an Indian child was vacated owing to certain statutory violations, and thereafter, the mother petitioned to have the child returned to her custody. (651 P.2d at pp. 1 171-1 172.) The Alaska Supreme Court held that a hearing on the issue of custody would be required, subject to the

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[22]It cannot be doubted that the R's, with whom the twins have been living since birth in a wholesome and stable environment, are appropriate parties to pursue a guardianship proceeding regarding the issue of the twins' future custody. (See Fam. Code, § 3040, subd. (a) (2).)

provisions of ICWA, section 1912, before a return to the mother could be ordered. (*Id.* at pp. 1175-1176.)

We therefore hold that, if the trial court determines upon remand that (1) ICWA applies in this case, and (2) under ICWA, the voluntary termination of the parental rights of the biological parents is invalid, the court must nevertheless hold a hearing on the question of whether there should be a change of custody. That can best be accomplished in the context of the R's petition to be appointed guardians of the twins.

California's guardianship law offers equitable and constitutionally permissible standards for resolving the question of the proper custody of the twins in the event their pending adoption by the R's fails due to the application of ICWA. These standards look to something more than the twins' "best interests," but rather require an examination of whether a custody change will result in detriment to them. These standards are consistent with the statutory preferences for maintaining a child's custodial ties with the biological parents, but do not require that result if the evidence shows that the child would be harmed if removed from the custody of those persons who have acted as de facto and psychological parents since birth and with whom the child has bonded.[23]

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[23]We find ourselves entirely in agreement with the comments of counsel for amicus American Academy of Adoption Attorneys who expressed the view that "a custody hearing is required to determine the placement of a child *whenever* an adoption is dismissed or denied, whatever the applicable law. When a child's interests and needs are affected detrimentally by a proposed remedy for a wrong inflicted upon a parent or de facto parent, the law must craft a solution that protects the child. Whether denominated an equitable or constitutional remedy, or a statutory solution, as, for example, the guardianship proceedings available under California law, it is essential that the Court not automatically 'return' children to individuals who are

Such guardianship hearing must be held under the provisions of Probate Code, section 1514, Family Code, sections 3040 and 3041, and ICWA, section 1912, subdivision (e). The burden of proof will necessarily rest upon the R's (Evid. Code, § 500.) The twins shall not be returned to the custody of the biological parents and may instead remain with the R's *if, and only if,* the R's can establish, by clear and convincing evidence, including the testimony of qualified expert witnesses, that a change of custody to the biological parents would be detrimental to the twins, and a grant of custody to the R's is necessary to serve the twins' best interests. (Fam. Code, §§ 3040, 3041; 25 U.S.C.§ 1912, subd. (e); *In re B.G.* (1974) 11 Cal.3d 679, 695, *In re Phillip B.* (1983) 139 Cal.App.3d 407, 421.)[24] In making this

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socially and psychologically strangers to them. This is not an argument for ignoring the rights and interests of any of the adult parties affected by a failed adoption. In cases like this one, a custody hearing will evaluate the affect on all parties, and especially the twins, of having been placed in what was reasonably understood to be a secure, permanent placement, a placement whose future may now depend on whether the twins will be classified retroactively as Indian children for the purposes of ICWA."

[24]ICWA section 1912, subdivision (e), provides: "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by *clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (Italics added.)

While this section refers to an order requiring "foster care," that clearly would encompass a guardianship proceeding. Under ICWA section 1903, subdivision (1), "foster care placement" is defined to include the placement of an Indian child in the home of a guardian. In addition, section 1912, subdivision (e), by its terms, concerns the determination whether the "continued" custody of a child

determination, the court should take into consideration the likelihood, or lack thereof, that the twins will suffer trauma if separated from the R's.[25]

The court will not be precluded from granting the guardianship petition because of any alleged failure to provide remedial and rehabilitative services to the biological parents, as provided in ICWA section 1912, subdivision (d). ICWA requires such services "to prevent the breakup of the Indian family." The only time at which the "breakup" of the twins' biological family could have been "prevented" was *before* the voluntary relinquishments which were made in this case. At that time, as we have already noted, the biological parents were counseled as required by California law (Fam. Code, 8621 and regulations adopted thereunder [Cal. Code Regs., tit. 22, § 35128 et seq]), concerning the relinquishment and adoption process, alternatives to adoption, resources for financial assistance, employment resources, child care resources, housing resources and

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with his or her parent or Indian guardian will cause detriment to the child. However, the governing principles and the burden of proof must necessarily be the same where the child is not in such parent's or guardian's custody, and the issue is whether a *resumption* of custody by the parent or guardian will be detrimental. Thus, the "clear and convincing" standard of section 1912, subdivision (e), is the proper one to be applied here. As already noted, the same evidentiary standard is also imposed by California law. (Fam. Code, § 3041; *In re B.G. supra*, 11 Cal.3d at p. 695; *In re Phillip B., supra*. 139 Cal.App.3d at p. 421.)

[25]The R's argue that this court is authorized by Code of Civil Procedure section 909 to make the requisite determinations regarding the children's best interests. Although the R's correctly point out that we have such authority, the needed determinations will require the taking of substantial evidence beyond what is in the existing record, a task which is obviously best undertaken by the trial court.

health service resources which were available to them if they determined not to relinquish their children. Despite such counseling, the parents decided, for good and sufficient reasons, to relinquish the children for adoption. We believe these circumstances adequately establish that active efforts were made to prevent the breakup of the family as required by ICWA section 1912, subdivision (d) and that such efforts were unsuccessful.

CONCLUSION

In this case we have concluded that ICWA cannot be constitutionally applied in the absence of evidence demonstrating that the biological parents had a significant social, cultural or political relationship with the Tribe. On the record before us, we find little or no support for the existence of such relationship. Indeed, the conduct of the biological parents in this matter with respect to the events and circumstances leading up to their relinquishment of the twins strongly suggests that no such relationship existed. However, we cannot conclude, as a matter of law, that the biological parents or the Tribe, upon remand, would not be able to produce additional evidence. Indeed, as a result of the trial court's ruling, none of the parties had any opportunity to present evidence on this critical issue. Therefore, a hearing in the trial court will be required to determine if there is any factual support to establish that the twins were a part of an existing Indian family so as to justify the application of ICWA. On this question, the burden of proof will be on the biological parents and the Tribe. If the trial court concludes that they have not carried their burden, then judgment shall be entered in favor of the R's and they will be free to proceed with the adoption proceedings now pending in Ohio. If the trial court finds otherwise, then it will be necessary to conduct a further hearing on the question of whether there should be a change of custody. The pending guardianship petition filed by the

R's would be a proper vehicle to resolve that question.[26] With respect to this issue, the R's will have the burden of proof.

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[26]In addition to the major issues on this appeal, the parties raise a number of minor contentions which may be dealt with parenthetically. Neither Richard's rights nor the Tribe's rights are affected by the circumstance, even if true, that Richard is not a presumed father. Regardless of state laws affecting the rights of unwed fathers, ICWA applies if a child is the biological child of a member of an Indian tribe. Nor are the rights of any party affected by the circumstance that the twins are only three thirty-seconds Indian. ICWA's application depends upon tribal membership, including the maintenance of significant contacts with the tribal community. It is not affected by any quantum of Indian blood, although such fact may have evidentiary value on the issue of whether there was an existing Indian family.

We need not address the issue of whether the Tribe should be precluded from invoking ICWA by retroactively enrolling Richard and the twins as tribal members, inasmuch as we have concluded that mere recognition by a tribe is, in any event, not sufficient to establish a significant tribal relationship for purposes of the application of ICWA.

Finally, where the biological parents concealed Richard's Indian heritage in order to facilitate the twins' adoption, equity might require that they be estopped from invoking ICWA to prevent it. However, such estoppel can have no practical effect upon the ultimate result in this case, because the Tribe has independent rights to object to the severance of its relationship to tribal children. In *Holyfield, supra*, 490 U.S. 30, the Supreme Court held that where a birth parent intentionally relinquished an Indian child for adoption, and never renounced or revoked the relinquishment, the Tribe retained its separate rights to have the relinquishment vacated over the birth parent's express objection. (490 U.S. at pp. 49-53.) A fortiori, if ICWA

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is granted. The order vacating the termination of the parental rights of Richard A. and Lucy R. over the minors Lucy and Bridget R. is reversed. The matter is remanded, and the trial court is ordered to conduct further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to the R's and Vista Del Mar.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.

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properly applies in this case, the Tribe has the right under 25 U.S.C. section 1914 to separately petition for vacation of the termination of the parents' rights, regardless of any estoppel which might operate against the parents, and the effect upon the twins' custody status will be the same.

APPENDIX B

B-1 NO CHANGE IN JUDGEMENT
CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re BRIDGET R., et al., Minors.	
JAMES R. AND COLETTE R., and VISTA DEL MAR,	B093520 (Super.Ct.No. BN1980 consol. w/ BC114849
Petitioners and Appellants,	
v.	
CINDY R. AND RICHARD A.,	ORDER DENYING PETITIONS FOR REHEARING AND MODIFYING OPINION
Objectors and Respondents.	
DRY CREEK RANCHERIA, ET AL.,	
Intervenors and Respondents.	
In re BRIDGET R., ET AL., MINORS.	B093694
JAMES R. AND COLETTE R.,	
Petitioners,	
v.	
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	
Respondent;	
CINDY R., RICHARD A., AND DRY CREEK RANCHERIA,	
Real Parties in Interest.	

The Petitions for Rehearing filed by the biological parents and the Tribe are denied. The opinion filed in the above-captioned action on January 18, 1996 is modified as follows:

On page 9, in line 15, delete "promulgated pursuant to Family Code section 8621." In line 16, after the closing parenthesis, insert "promulgated by the Department of Social Services, pursuant to legislative authority (Welf. & Inst. Code, § 10553; see now Fam. Code, § 8621)," so that the second sentence of paragraph 3 on page 9, exclusive of the footnote, reads:

> "On November 11 and 12 respectively, after receiving counseling concerning the relinquishment and adoption process as required by regulations (Cal. Code Regs., tit. 22, § 35128 et seq.) promulgated by the Department of Social Services, pursuant to legislative authority (Welf. & Inst. Code, § 10553; see now Fam. Code, § 8621), Richard and Cindy signed documents relinquishing the twins to Vista Del Mar, with the intent that they would be adopted by the R's.

On page 57, in lines 8 to 9, beginning after the opening parenthesis near the end of line 8, delete "Fam. Code, § 8621 and regulations adopted thereunder"; in line 9, delete the space and the opening bracket before "Cal.Code of Regs," and delete the closing bracket after "et seq.," so that the fourth full sentence on page 57 reads:

> "At that time, as we have already noted, the biological parents were counseled as required by California law (Cal. Code Regs., tit. 22, § 35128 et seq.), concerning the relinquishment and adoption process, alternatives to adoption, resources for financial assistance, employment resources, child care resources, housing resources and health service resources which were available to them if they determined not to relinquish their children."

There is no change in judgment.

APPENDIX C

C-1

No.2/3 B093520-S052021

IN THE SUPREME COURT OF CALIFORNIA

IN RE BRIDGET R.et al.,Minors

JAMES R.et al.,Appellants

v.

CINDY R. et al.,Respondents

Petitions for review DENIED.

Kennard, J. is of the opinion review should be granted.

The request for an order directing depublication of the opinion is denied.

Mosk, J. did not participate.

George

Chief Justice

APPENDIX D

. . . . . 25 U.S.C. sections 1901-1916

1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

1902. Congressional declaration of policy

Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the security of Indian tribes and families by the establishment of minimum standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term-

(1) "child custody proceedings shall mean and include-

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement: and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent:

(3) "Indian" means any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodians" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or

organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 1602 (c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe or any other administrative body of a tribe which is vested with authority over child custody proceedings.

1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian Child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or

domicile of the child.

(b) Transfer of process; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciles or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

1912. Pending court proceedings

(a) Notice: time for commencement of proceedings: additional time for preparation

In any involuntary proceeding in a State court, where the court

knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) services and rehabilitative programs preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage to the child.

(f) Parental rights termination orders; evidence, determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters: invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such

consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement, withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent, return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination, or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in State court, the parent may withdraw consent thereto upon the grounds consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the

provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe, or (3) other Indian families.

(b) Foster care or preadoptive placements, criteria; preferences

Any child accepted for foster care or preadoptive placement shall placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement a preference shall be given, in the absence of good cause to the contrary, to a placement with-

(i) a member of the Indian child's extended

family,

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered, anonymity In application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order, so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§1916. Return of custody

(a) Petition best interests of child

Notwithstanding State law to the contrary. whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home, placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.